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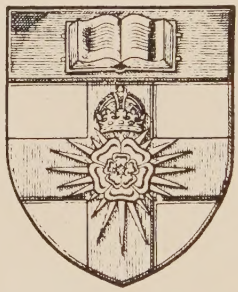

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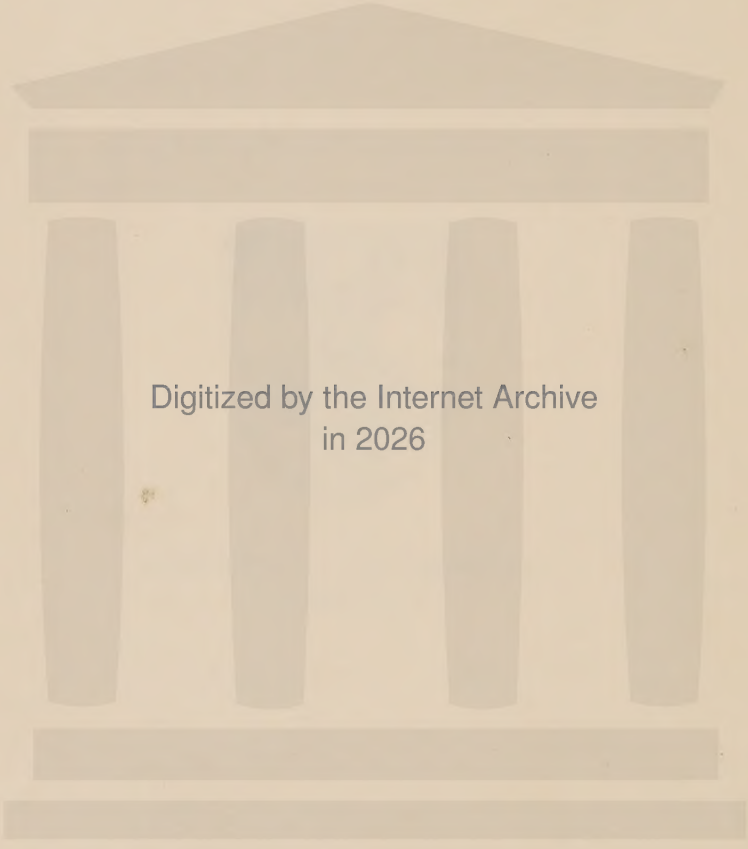

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

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Jan. 24, 25.

DONALD H. SCOTT AND COMPANY, LIMITED *v.* BARCLAYS BANK, LIMITED.

[1921. D. 168.]

Banker—Letter of Credit—Condition—Tender of "approved insurance policy"—Certificate of Insurance.

Bankers issued a letter of credit to English sellers of 100 tons of steel plates to Dutch buyers. By the terms of the letter of credit the bankers agreed to honour the sellers' draft for the amount of the purchase money (which included freight and insurance to Rotterdam) provided the draft were accompanied by an approved insurance policy covering the shipment of the goods. The sellers presented their draft accompanied by a certificate of insurance which did not contain and

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did not offer any means of ascertaining the full terms of the insurance. In an action by the sellers against the bankers for not honouring the draft:—

Held, that the certificate was not an "approved insurance policy" within the meaning of the letter of credit, and that the bankers were justified in refusing to honour the draft.

Diamond Alkali Corporation v. *Bourgeois* [1921] 3 K. B. 443 approved.

An approved insurance policy is one to which no reasonable objection can be made.

The Court refused to decide whether a policy in foreign currency is an approved insurance policy within the meaning of a letter of credit expressed in sterling; and also whether a policy valid abroad but invalid in England for want of conformity with statutory requirements in England was an approved insurance policy within the meaning of an English letter of credit.

Judgment of Sankey J. reversed.

APPEAL from the judgment of Sankey J. in an action tried before the learned judge without a jury.

In January, 1920, negotiations took place between the plaintiffs, through their agent Mr. Arie Schippers of Rotterdam, and a Dutch firm of N. V. Machienfabriek en Scheepswerf De Waal of Nymegen for the sale by the plaintiffs, who carried on business in London, to the Dutch firm of 50 tons of steel ship-plates of 25 ft. × 60 in. × $\frac{1}{4}$ in. and 50 tons of similar plates of 30 ft. × 72 in. × $\frac{5}{16}$ in. at 23*l.* 15*s.* per ton, to include cost, insurance and freight to Rotterdam. As one of the terms of the contract of sale it was agreed that the Unie Bank voor Nederland en Kolonien of Rotterdam should on behalf and for the account of the purchasers open a credit with the defendants in favour of the plaintiffs up to an amount of 2375*l.* and that the plaintiffs' draft to that amount would be honoured by the defendants upon presentment of a full set of clean bills of lading drawn to order indorsed and marked "notify Mr. Arie Schippers, Rotterdam," invoice, approved insurance policy including war risk, certificate of inspection, and tests by Lloyd's Register of Shipping relating to the 100 tons of ship plates the subject matter of the contract. Drafts drawn upon this credit were to be presented to the defendants not later than December 15, 1920, and to be marked "Drawn under credit of Barclays Bank, Ld., No. 14291 dated January 27, 1920."

Confirming these terms the defendants wrote to the plaintiffs on January 27, 1920, as follows :—

"We are to-day informed by the Unie Bank voor Nederland en Kolonien, Rotterdam, that he has (sic) established a credit with us in your favour for account of Messrs. N. V. Machienfabriek en Scheepswerf De Wall, Nymegen, to the extent of 2375*l.* available for your drafts on us at sight to be accompanied by a full set of clean bills of lading to order blank indorsed marked 'notify Mr. Arie Schippers, Rotterdam,' certificate of inspection and tests by Lloyd's Register of Shipping, invoice, and approved insurance policy covering a shipment, including war risk for a shipment, of a total of 100 tons of steel ship plates specified as follows :—

50 tons steel ship plates,
$25' . 0'' \times 60'' \times \frac{1}{4}''$;
50 tons steel ship plates,
$30' . 0'' \times 72'' \times \frac{5}{16}''$;

at the price of 23*l.* 15*s.* per ton c.i.f. Rotterdam. Drafts drawn under this credit must be presented to us not later than March 15, 1920. Kindly note that all drafts drawn under this credit must be marked 'Drawn under credit of Barclays Bank, Ld., No. 14291 dated January 27, 1920.'

"We undertake that all drafts drawn in conformity with the terms of this credit will meet with due honour on presentation, provided they are marked as being so drawn."

The date March 15 terminating the period of the credit was afterwards extended to December 15, 1920.

On December 14, 1920, the plaintiffs, through the Union Bank of Scotland, presented to the defendants a draft in these terms :—

"London December 14, 1920. No. 125. For 2375*l.* At sight Pay to the order of the Union Bank of Scotland, Ld. . . . . 2375*l.* Value per s.s. *Capulin*. Drawn against credit 14291. To Messrs. Barclays Bank, Ld. Donald H. Scott & Co. Ld., (Signed) D. H. Scott, Director." Accompanying this draft were the following documents :—

(1.) Two invoices from the plaintiffs to the Dutch buyers, one for 84 steel ship plates of the dimensions

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25 ft. × 60 in. × ¼ in. weighing 49 tons 1 cwt. 1 qr. 15 lbs. at 23*l.* 15*s.*, total 1165*l.* 5*s.* 9*d.*, and the other for 47 steel ship plates of the dimensions 30 ft. × 72 in. × $\frac{5}{16}$ in. weighing 51 tons 8 cwt. 3 qrs. 5 lbs. at 23*l.* 15*s.*, total 1221*l.* 13*s.* 11*d.*, shipped per s.s. *Capulin* c.i.f. Rotterdam.

(2.) Two bills of lading relating to the goods specified in the first invoice and two bills of lading relating to those in the second invoice.

(3.) Two certificates of insurance, one for $4712 covering 49·07 tons of steel plates and the other for $4940 covering 51·44 tons of steel plates, in the following form, taking the former as an example :—

" Certificate of Insurance.

" Firemans Fund Insurance Company of San Francisco $4,712.00. November 26, 1921. No. 799807.

" This is to certify that on November 26, 1920, this Company insured under policy No. 3747 for Takamine Commercial Corporation 4712 dollars on 49·07 gross tons steel plates valued at sum insured (as per conditions of policy) shipped on board of the s.s. *Capulin* $\frac{\text{and}}{\text{or}}$ subsequent steamers at and from Harrisburg, Pa., overland to Baltimore, thence to Rotterdam and it is hereby understood and agreed that in case of loss such loss is payable to the order of Takamine Commercial Corporation on surrender of this certificate. This certificate represents and takes the place of the policy and conveys all the rights of the original policy holder for the purpose of collecting any loss or claims as fully as if property was covered by a special policy direct to the holder of this certificate, and free from any liability for unpaid premiums. Not valid unless countersigned by an official of the assured. F. H. & C. R. Osborn, Managers. Countersigned : Takamine Commercial Corp. S. B. Carrigan, Treas."

[Here followed a notice requiring the document to be stamped in conformity with the Revenue laws of Great Britain.]

" Conditions. This certificate subject to the full terms of the policy in respect of being free from claim in respect of capture, seizure, detention or the consequences of hostilities.

Held covered at a premium to be arranged in case of deviation or change of voyage or of any error or unintentional omission in the description of the interest, vessel or voyage provided same be communicated to the assurers as soon as known to the assured.

"Held covered on board craft $\frac{\text{and}}{\text{or}}$ lighter to and from the vessel. Each craft $\frac{\text{and}}{\text{or}}$ lighter to be deemed a separate insurance.

"The said merchandise is insured as under deck unless otherwise specified in this certificate.

"It is agreed that there shall be no return of premium if interest insured be lost by perils not insured against hereunder.

"General average and salvage charges payable as per foreign statement or per York-Antwerp Rules, 1890, if in accordance with contract of affreightment.

"It is understood and agreed that this insurance attaches from the time the goods leave the factory, store or warehouse at initial point of shipment in the United States and remains in force continuously thereafter while in due course of transit whether shipped on through or local bills of lading or otherwise until delivery at factory, store or warehouse at final point of destination except on shipments destined to China, Japan, East Indies, Mexico, Russia, Switzerland, and the River Plate."

[Here followed provisions applicable to shipments for China, Japan, East Indies, Mexico, Russia, Switzerland, and the River Plate.]

"Marks and Numbers—M—1225. Car. P. & L. E. 43913.

"Free from particular average unless the vessel, craft or lighter be stranded, sunk burned or in collision. This certificate is hereby extended to cover war risk in accordance with the terms, valuations and conditions of open policy and war risk indorsement attached thereto. Taxamine Commercial Corp. (Signed) S. B. Carragan, Treas.

"It is hereby understood and agreed that in case of any loss or damage happening to the property insured under this certificate, the same shall be reported as soon as the

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goods are landed, or the loss is known or expected, to the nearest agent of the company. It is especially agreed that all claims under this certificate on goods destined for ports and places in the United Kingdom of Great Britain shall be reported to and paid at the current rate of exchange by Joseph Hadley, 3 Lothbury, London, or Messrs. Brodrick, Leitch & Kendall, B.18 Liverpool and London Chambers, Liverpool."

[Here followed provisions relating to claims in respect of goods destined for ports and places other than in the United Kingdom.]

"It is agreed that upon the payment of any loss or damage the insurers are to be subrogated to all the rights of the assured under their bills of lading or transportation receipts to the extent of such payments.

"It is understood and agreed that in case any agreement be made by the assured with any carrier by which such carrier stipulates to have, in case of any loss for which he may be liable, the benefit of this insurance, then and in that event the insurer shall be discharged of any liability for such loss hereunder.

"Claims to be adjusted according to the usages of Lloyd's, but subject to the conditions of the policy."

(4.) A letter dated December 15, 1920, from the Union Bank of Scotland addressed to the defendants in these terms: "In consideration of your paying the draft p. 2375*l.* and documents referred to in our letter of the 14th inst. under the above credit, we hereby hold you harmless for your paying the above draft, notwithstanding that the amount of goods stipulated in the bill of lading and invoices are approximate amounts to those required in terms of the credit, and we also hold you harmless to any claim that may arise in respect of insurance certificates notwithstanding that they are issued in dollar currency. Our liability under this credit is to expire on January 15, 1921."

On receiving these documents the defendants acting on instructions from the Unie Bank voor Nederland en Kolonien refused to honour the draft. The plaintiffs then undertook

to produce, and subsequently did produce the third bill of lading relating to each invoice, but the defendants being dissatisfied with the certificate of insurance still refused to honour the draft. The plaintiffs then brought the present action and claimed 2375*l.* By agreement the goods or some of them were sold on account of the party to whom they should be held to appertain, and fetched 814*l.* 10*s.* 11*d.*

Sankey J. held (1.) that the certificate of insurance was an approved insurance policy within the meaning of the letter of credit of January 27, 1920; (2.) that the defendants had accepted the plaintiffs' undertaking to produce the third bill of lading in each case; and (3.) that the slight difference between the amounts of the goods sold and specified in the letter of credit on the one hand, and the amounts shown in the invoices and bills of lading on the other, did not warrant the defendants in rejecting the documents. He therefore gave judgment for the plaintiffs for 1560*l.* 9*s.* 1*d.*

The defendants appealed.

MacKinnon K.C. and *Micklethwait* for the appellants. The appellants were within their rights in refusing to pay the respondents' draft against the letter of credit because the documents accompanying the draft failed to conform with the terms of the letter of credit in four respects.

(1.) No approved insurance policy was tendered. What was tendered was not a policy but a certificate that the respondents were insured under a policy. The certificate was not capable of being sued upon; it did not set out the terms of the contract of insurance. The policy itself was in New York and the respondents had no convenient means of access to it. Sankey J. held that the certificate was a document of insurance on the evidence of American witnesses that it would be so treated in the United States; but the question is how it would be regarded here. It would not be treated here as a good tender of a policy of insurance by a purchaser under an ordinary c.i.f. contract: *Diamond Alkali Corporation* v. *Bourgeois.* (1)

(1) [1921] 3 K. B. 443.

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(2.) The certificate of insurance is not expressed in the same currency as the letter of credit: the insurance is stated to be in dollars; the credit is in sterling. The amount recoverable on the insurance would depend on the rate of exchange at the date of the loss. The buyers never agreed to take that risk, and still less did the respondents.

(3.) Full sets of bills of lading were not tendered, but only two bills for each invoice. No doubt the respondents gave an undertaking to hand triplicate bills at a later date and offered an indemnity through their bankers if the appellants would honour the draft; but a bill of lading is not an undertaking or an indemnity, and the respondents were not bound to accept either of the latter as a substitute for the former.

(4.) The bills of lading were not for the right amounts. The shipments were to be for 50 tons of $\frac{1}{4}$ in. plates and 50 tons of $\frac{5}{16}$ in. plates. The bills of lading were for 49 tons of one thickness and 51 tons of the other. Sankey J. considered that so slight a difference would not ground a reasonable objection among mercantile men. It may be that as between buyer and seller a certain latitude is allowed: see, per Bigham J., *Harland* v. *Burstall.* (1) But bankers to whom documents are tendered under a letter of credit are in a different position. Vendors and purchasers know the usages of the markets in which they deal; but bankers who issue letters of credit to sellers in various markets cannot be supposed to know the usages of all those markets. They are entitled to insist that the documents tendered shall strictly comply with the terms of the credit. They are not bound to decide arguable questions which may arise between the vendor and the purchaser of the goods for the price of which the letter of credit is given: *International Banking Corporation* v. *Irving National Bank* (2); *Lambourn* v. *Lake Shore Banking Co.* (3)

(5.) The total of the invoice prices exceeded the amount of the credit by 11*l.* 19*s.* 8*d.*

Schiller K.C. and *H. D. Samuels* for the respondents.

(1) (1901) 6 Com. Cas. 113, 116.
(2) (1921) 274 Fed. Rep. 122.
(3) (1921) 196 App. Div. 504; affirmed (1921) 231 N. Y. 616.

The evidence before the learned judge established that certificates of insurance like those tendered in this case are invariably accepted as insurance policies. Of American certificates of insurance Bailhache J. in *Wilson & Co.* v. *Belgian Grain Co.* (1) said that they were equivalent to policies and accepted as policies in this country. An approved insurance policy, like an approved bill, is one to which no reasonable objection can be taken: *Smith* v. *Mercer.* (2)

Counsel also argued that on the evidence the appellants had accepted the indemnity offered by the Union Bank of Scotland and waived the tender of the third bill of lading which should have accompanied each invoice; and that the contract of sale, which would permit of a slight discrepancy between the quantity of goods contracted for and the quantity delivered, ought with that modification to be read into the letter of credit.

Counsel for the appellants were not called upon in reply.

BANKES L.J. A firm in Holland entered into a contract with the representative of an English firm in Holland for the purchase of a quantity of ship's plates, 50 tons of one size and 50 tons of another, at 23*l.* 15*s.* a ton to include cost, insurance, and freight to Rotterdam. It was part of the contract that payment should be arranged for by means of a credit opened in London, and on January 23, 1920, a Dutch firm of bankers gave instructions to the appellants to open the necessary credit. As a result on January 27, 1920, the appellants issued a letter of credit to the vendors. The action was brought for an alleged breach by the appellants of the terms of that letter, which contains the only contract between these parties. The contract of sale being on the terms that the purchase price included cost, freight, and insurance to Rotterdam, it was necessary that proper documents relating to such a sale should be tendered to the purchaser. The letter of credit specified what those documents should be. It was in these terms: [The Lord Justice read the letter of credit of January 27, 1920, set out above,

(1) [1920] 2 K. B. 1, 7. (2) (1867) L. R. 3 Ex. 51.

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and proceeded :] The date within which drafts were to be presented—namely, March 15, 1920—was afterwards, on November 16, extended to December 15, 1920. On December 14, 1920, drafts were presented. Accompanying those drafts were bills of lading in sets of two and two certificates of insurance. I take one of these certificates as an example. Having inspected these documents the appellants refused to honour the drafts. Hence this action.

The main objections taken at the time of rejection seem to have been, first, that this certificate of insurance, if an insurance policy at all, was for an amount specified in dollars instead of in sterling, as the appellants said it ought to have been ; secondly, that the invoices did not conform with the letter of credit. When the action was brought the objections were amplified so as to include, in addition to the objection to the document tendered as an " approved insurance policy," an objection that a full set of clean bills of lading had not been tendered, and an objection that the draft was for an amount exceeding that specified in the letter of credit. All those objections were discussed before the learned judge.

The large and important part which letters of credit play in modern commerce restrains me from expressing my opinion on many of the points argued. The system should be kept as free as possible from technicalities, and from unnecessary judicial dicta which may embarrass business dealings in the future. I therefore confine myself to two of the points raised upon which I have formed a confident opinion. First upon the question whether the certificate of insurance was proper tender of an approved insurance policy, I think the principle applicable is well stated by Bailhache J. in *Wilson & Co.* v. *Belgian Grain Co.* (1) The question to be decided in that case was whether a vendor could properly tender a broker's cover note in performance of a c.i.f. contract which required him to tender a policy of insurance. Bailhache J. said : " It is of course clear that the buyer, if he chooses to do so, may waive his right to require a policy of insurance, and may agree to take some other document. If he chooses to adopt that

(1) [1920] 2 K. B. 1, 9.

course, a document other than a policy can only be forced upon him if it is a document of the kind which he has agreed to take. He cannot be compelled to take a document which is something like that which he has agreed to take. He is entitled to have a document of the very kind which he has agreed to take, or at least one which does not differ from it in any material respect." That statement of principle is just as applicable to a letter of credit as to a contract of sale, and it may be stated generally that where a banker issues a letter of credit he is entitled to performance of all conditions precedent before he can be required to pay the amount specified, and if he stipulates as a condition precedent that he shall have a full set of clean bills of lading and an approved insurance policy, he is entitled to have those very documents, or at the least documents not materially differing from those documents, before he can be compelled to honour drafts upon him. It is to be observed that in *Wilson & Co.* v. *Belgian Grain Co.* (1) Bailhache J. used words, which were not necessary to the decision, but to which the learned judge's experience gives weight; he spoke of "American certificates of insurance which stand on a different footing and are equivalent to policies, being accepted in this country as policies." I do not know what form of certificate the learned judge had in mind; it may have been one containing all the terms necessary to constitute a valid policy of insurance according to English law. However that may be, his words must not be taken to include American certificates of insurance in whatever form they may be expressed.

Applying the general principle then, first, was a full set of clean bills of lading, and secondly, was an approved insurance policy, tendered? The first condition was not complied with. Only two bills of lading instead of three were tendered. A tender of two bills of lading and an undertaking to produce the third, or of two bills of lading and an indemnity for not insisting on the third, is not a compliance with a condition requiring production of a full set. The learned judge treated this point as of no importance, perhaps because he thought

(1) [1920] 2 K. B. 7.

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the evidence established a waiver of the objection. I express no opinion whether that was the true inference from the evidence. It is admitted that a tender of two bills accompanied by either an undertaking to produce the third or an indemnity for accepting less than three is not a sufficient tender. If the learned judge was wrong in inferring a waiver, that is enough to dispose of this case. But I do not rest my decision on that ground alone, because the true effect of the evidence may be a matter of doubt.

On the next point, which is a very important one, two questions arise on the form of the document. First, does the document contain sufficient information to enable any one reading it to ascertain whether it reaches the standard of an "approved insurance policy"? The other is whether the expression "approved insurance policy," occurring in a letter of credit issued by an English bank to an English trading firm, means a policy of insurance in the English form valid according to English law and enforceable in England. It is not necessary to decide that question in this case. I rest my decision upon the fact that the document tendered was one of which no one could assert that it did or did not fall within the terms of the letter of credit. It is a certificate of insurance, and the certification is of the fact that "on November 26, 1920, this company insured under policy No. 3747 for Takamine Commercial Corporation 4712 dollars on 49·07 gross tons steel plates valued at sum insured as per conditions of policy shipped on board of the s.s. *Capulin* $\frac{\text{and}}{\text{or}}$ subsequent steamers." . . . . That only indicates that a policy has been issued by this company; but the terms of that policy, the risks insured against, and the conditions imposed by the policy respecting shipment can only be ascertained by reference to some document which did not accompany the certificate and of which the appellants could know nothing. This point has been discussed by McCardie J. in *Diamond Alkali Corporation* v. *Bourgeois* (1), where dealing with a certificate in the same form as the document in this case the learned judge said: "Now a certificate is not a policy.

(1) [1921] 3 K. B. 443, 455.

It does not purport to be a policy. . . . . It is a certificate that a policy was issued to D. A. Horan, and it incorporates the terms of that policy. Those terms I do not know, nor is there anything before me to indicate that the buyers knew them. The certificate does not show whether that policy was in a recognized or usual form or not. The certificate does not therefore contain all the terms of the insurance. Those terms have to be sought for in two documents—namely, the original policy and the certificate. But even if this document is not a policy yet the sellers say it is 'equivalent to a policy.' In connection with that phrase it is well to quote from another part of the judgment of Bailhache J. in *Wilson & Co.* v. *Belgian Grain Co.* (1) He there says: 'He'—the buyer—'cannot be compelled to take a document which is something like that which he has agreed to take. He is entitled to have a document of the very kind which he has agreed to take, or at least one which does not differ from it in any material respect.' This leads me to ask whether the document before me differs in any material respect from a policy of insurance. To begin with, I do not see how the buyer here could know whether the document he got was of a proper character (one he was bound to accept) unless he saw the original policy, and examined its conditions, whether usual or otherwise." That seems to me a conclusive answer to the claim of the respondents that they had tendered an approved insurance policy, and I am content to decide this case upon this single point in accordance with the opinion of McCardie J.

That learned judge went on in *Diamond Alkali Corporation* v. *Bourgeois* (2) to express an opinion that the certificate of insurance was not an "approved insurance policy" in that it did not comply with the English law relating to policies of marine insurance. I desire to reserve my opinion upon that important point. There is much force in the argument that the person who has to decide whether documents tendered to him correspond with those agreed to be tendered is entitled to have documents which will enable him to judge whether the terms of the agreement have been complied with; but

(1) [1920] 2 K. B. 1, 9. (2) [1921] 3 K. B. 443.

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it is not necessary to lay down any hard and fast rule and I definitely refrain from any expression of opinion which may hinder or cripple business in the future. For the same reason I forbear from giving any opinion whether a policy expressed in dollars was a good tender under an English letter of credit. For the reasons I have already given I think this appeal must be allowed.

SCRUTTON L.J. I am of the same opinion. The question is whether the appellants, who had given a confirmed credit to the respondents on behalf of a Dutch firm who were buyers of certain steel plates from the respondents, were right in refusing to accept a tender of documents made under the confirmed credit. The case raised a number of important questions, which require very careful consideration upon further evidence before the Court should attempt any ruling upon them. I propose to decide this case upon one point and I expressly reserve my opinion upon the others.

The appellants gave a confirmed credit to the respondents; that is to say they entered into contractual relations with them from which they could not withdraw except with the consent of the other party, and the respondents were entitled, on complying with the terms on which the confirmed credit was given, to receive sums of money up to 2375*l.* from the appellants. The terms of the credit were that the respondents' drafts at sight were to be accompanied by a full set of clean bills of lading indorsed and marked as stipulated, and, among other things, an invoice and approved insurance policy covering shipments of a total of 100 tons of steel ship plates as specified at the price of 23*l.* 15*s.* per ton c.i.f. Rotterdam.

The question I intend to decide is whether the respondents tendered an "approved insurance policy." I take the meaning of "approved" in that phrase to be the same as Lord Ellenborough gave the word in *Hodgson* v. *Davies* (1) when applied to a bill of exchange—namely, a bill "to which no reasonable objection could be made and which ought to be approved." So here the insurance policy must be one to

(1) (1810) 2 Camp. 530, 532.

which no reasonable objection could be made and which ought therefore to be approved. What was tendered was a document called an American certificate. I am not deciding in this case that all American certificates are bad tender. I am dealing only with the certificate tendered in this case. That was a certificate of the Firemans Fund Insurance Company of San Francisco on the face of which is the statement that it represents and takes the place of a policy numbered 3747 for the Takamine Commercial Corporation. This certificate states certain terms of the insurance, but for others it expressly refers the reader to the policy itself, and no one looking at the certificate alone can tell what the terms of the insurance are. It certifies that the company insured under the policy $4712 on 49 tons of steel plates "(as per conditions of policy) shipped upon the s.s. *Capulin*." It states under the heading "Conditions": "This certificate subject to the full terms of the policy in respect of being free from claim in respect of capture, seizure, detention or the consequences of hostilities." "This certificate is hereby extended to cover war risk in accordance with the terms, valuations and conditions of open policy and war risk indorsement attached thereto." Accordingly when this document was tendered to the appellants they could not tell what terms of insurance they were being offered as security for the loss of the goods. In my opinion they had a right to see a document or documents containing the terms, and if they are tendered a document which does not show what the terms are they are acting reasonably in refusing to accept it. A certificate in this form which does not state the terms of insurance so that they can all be seen by the person to whom it is tendered is not an approved policy; it is one to which a reasonable objection can be made. That is the point on which I decide this case.

A point was argued whether an approved insurance policy to be a good tender under an English letter of credit must be one recognized in England which can be sued on in England. As to that, I do not decide whether a certificate which shows on its face all the terms of the insurance and which can be

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sued on in the United States is a good tender or a bad tender under such a letter of credit. Another question raised was whether an approved policy to be good tender under a letter of credit expressed in sterling must be a policy payable in sterling; it was objected that one who requires security for an amount in sterling cannot be sure he has got it if the policy tendered is in another currency, because owing to the risks of exchange the amount of foreign money may not afford cover for the amount secured when the time comes for assessing the loss. I regard this as a question of great importance. I am by no means satisfied that we have before us sufficient materials to answer it; and therefore I do not decide it.

Two other points were raised; but I do not decide them finally. The letter of credit stipulated for a full set of clean bills of lading. Two were tendered, and with them an undertaking to produce the third or an indemnity for not requiring it. That was a bad tender, if the terms of the letter of credit were insisted upon. I think that was admitted. There is a question of some doubt upon the evidence—namely, whether the appellants waived the strict performance of this term. I do not decide that question. The undertaking or indemnity might be accepted as a matter of agreement; if not accepted it is not a good tender.

Then it was said that the letter of credit was in respect of 100 tons only and that the documents tendered related to more than 100 tons. The answer offered is that by commercial usage 100 tons includes a margin large enough to cover the discrepancy in this case. I do not decide whether the evidence was sufficient to establish the usage. Unless the usage is proved the terms of the credit must be adhered to.

But as I have already said I decide this case upon the one point that the certificate of insurance, which does not show on its face the terms of the insurance offered in place of the goods if lost, is not an approved insurance policy and that the appellants were entitled to reject it. Therefore I agree that the appeal should be allowed.

ATKIN L.J. I agree; and as the judgment of this Court is confined to one point I have little to add. In my view the phrase "approved insurance policy" indicates a reference to some more objective or absolute standard than the approval of the person to whom it is tendered. It means a policy to which no reasonable objection can be made by reasonable commercial men. One may very reasonably object to a document which comes masquerading as a policy of insurance, that on closer inspection it does not really purport to be a policy at all but only a certificate that a policy has been issued; that it does not contain on the face of it the terms of the actual contract of insurance or the risks against which the insuring company purports to secure the assured; and that there are no means of ascertaining those terms except by reference to another document which is not tendered and is not within convenient reach for reference; though even if it were I do not say that would invalidate the objection. As it is the bankers, who may have to rely upon the policy of insurance to cover them from loss in case they have no effectual recourse against the customer at whose request they have given the credit, have no means of discovering to what extent they are covered, and that is a perfectly valid objection to this document. I wish to make it quite clear that upon the other points raised no opinion is given on one side or the other.

Appeal allowed.

Solicitors for appellants: *Durrant, Cooper & Hambling.*
Solicitor for respondents: *E. Mackie.*

W. H. G.

C. A.

1922

Nov. 22, 23, 24.

1923

Feb. 20.

[IN THE COURT OF APPEAL.]

In re MARQUESS OF ABERGAVENNY.

NEVILL *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Estate Duty—Estates Tail limited by Will—Forfeiture on Attainder of Tenant—Restoration by Act of Parliament of Estates to Successor—Confirmation by subsequent Act and Estates Tail thereby made inalienable—Interest of Tenant in Tail, whether aggregable with his other Property—"Interest of successor"—Principal Value of Lands and Chattels deemed to be Interest for Purpose of Valuation—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 4, 5, *sub-s.* 5—*Finance Act*, 1900 (63 & 64 *Vict. c.* 7), *s.* 12, *sub-s.* 2—*Finance Act*, 1907 (7 *Edw.* 7, *c.* 13), *s.* 16—*Finance Act*, 1922 (12 & 13 *Geo.* 5, *c.* 17), *s.* 44.

By the Finance Act, 1894, s. 1: "In the case of every person dying after the commencement of this Part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'Estate duty.' . . . ."

By s. 4: "For determining the rate of Estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which Estate duty is leviable shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof: Provided that any property so passing, in which the deceased never had an interest, or which under a disposition not made by the deceased passes immediately on the death of the deceased to some persons other than the wife or husband or a lineal ancestor or lineal descendant or of the deceased, shall not be aggregated with any other property but shall be an estate by itself. . . . ."

By s. 5, sub-s. 5: "Where any lands or chattels are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession thereof is capable of alienating the same, whether his interest is in law a tenancy for life or a tenancy in tail, the provisions of this Act with respect to settled property shall not apply, and the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued, for the purpose of Estate duty, in like manner as for the purpose of Succession duty."

Testator at the time of his death was in the enjoyment of three classes of property—namely, property derived from certain inalienable estates, property comprised in his marriage settlement, and property of which he was free to dispose and did dispose of by his will. The inalienable estates were in 1535 devised by the will of G. to the use of T. and his heirs male and in default to E. and his heirs male with remainders over. T. died without issue and E. succeeded to the estates. In 1538 E. was

attainted of high treason and beheaded and the estates became forfeited to the Crown. By a private Act passed in 1542 the estates were restored to E.'s son and in 1554 a subsequent private Act was passed which confirmed the previous Act and made the estates inalienable. The testator was the direct descendant of E. On his death in 1915 the Commissioners of Inland Revenue for the purpose of assessing the amount of estate duty aggregated the inalienable estates with the property passing under the testator's settlement and will. Petitions were presented by the trustee of the settlement and the executors of the will respectively for declarations (1.) that the inalienable estates passed under the will of G., that is "under a disposition of a person dying before the commencement of Part I. of the Finance Act, 1894," within the meaning of s. 12, sub-s. 2, of the Finance Act, 1900, and (2.) that by the provisions of s. 5, sub-s. 5, of the Finance Act, 1894, the property passing in the inalienable estates was merely the interest of the successor in them and was not a property in which the deceased had an interest at his death, and therefore that the estates were not aggregable with his other property:—

Held, that the inalienable estates passed under the disposition made under the Act and not under that made by the will.

Held, also (Warrington L.J. dissenting), that in the cases covered by s. 5, sub-s. 5, of the Act of 1894, as in all other like cases under that Act, the property which passed on death was "the lands and chattels" themselves, and that the sole purpose of the sub-section was, in the case of the special settlements with which it dealt, to fix "the principal value" of the lands and chattels which did pass according to a measure which would not be applicable but for the sub-section. The principal value of those lands and chattels was to be the value of the interest of the successor in them ascertained as provided by the sub-section.

Held, therefore, that the inalienable estates must be aggregated with the property of the testator passing under his marriage settlement and will for the purpose of determining the rate of estate duty.

Decision of Sankey J. affirmed.

APPEAL from decisions of Sankey J. dismissing two petitions presented pursuant to the Finance Act, 1894, relating to the estate duty payable on the death of the late Marquess of Abergavenny, who died on December 12, 1915.

The petitioner in the first petition was the surviving trustee of the marriage settlement, dated May 2, 1848, of the late Marquess. The petitioners in the second petition were the executors of his will.

The property in the enjoyment of the late Marquess at the time of his death was of three different classes: (1.) property derived from certain inalienable estates; (2.) property comprised in his marriage settlement; and (3.) free property which he could dispose of by will.

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The Commissioners had decided that the inalienable estates were for the purpose of calculating the rate of estate duty aggregable with the marriage settlement funds and the property passing under the will.

Among the questions raised by the petitions were the following: 1. Whether in the circumstances of the case the inalienable estates passed or were to be deemed to pass under a disposition made by a person dying before the commencement of Part I. of the Finance Act, 1894, within the meaning of s. 12 of the Finance Act, 1900 (1), and s. 16 of the Finance Act, 1907. (1) 2. Whether having regard to the provisions of s. 4 and s. 5, sub-s. 5, of the Finance Act, 1894 (1), and

(1) Finance Act, 1894, s. 1: "In the case of every person dying after the commencement of this Part of this Act, there shall, save as herein-after expressly provided, be levied and paid, upon the principal value ascertained as herein-after provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'Estate duty,' at the graduated rates herein-after mentioned, and the existing duties mentioned in the First Schedule to this Act shall not be levied in respect of property chargeable with such Estate duty."

Sect. 4: "For determining the rate of Estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which Estate duty is leviable shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof:

Provided that any property so passing, in which the deceased never had an interest, or which under a disposition not made by the deceased passes immediately on the death of the deceased to some person other than the wife or husband or a lineal ancestor or lineal descendant of the deceased, shall not be aggregated with any other property but shall be an estate by itself, and the estate duty shall be levied at the proper graduated rate on the principal value thereof. . . . ."

Sect. 5, sub-s. 5: "Where any lands or chattels are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession thereof is capable of alienating the same, whether his interest is in law a tenancy for life or a tenancy in tail, the provisions of this Act with respect to settled property shall not apply, and the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued, for the purpose of Estate duty, in like manner as for the purpose of Succession duty."

Finance Act, 1900, s. 12, sub-s. 2: "Where settled property passes, or is deemed to pass, on the death of a person dying after the passing of this Act under a disposition made by a person dying before the commencement of Part I. of the Finance Act, 1894, and such property would, if the disponer had died after the commencement of the said Part,

s. 12 of the Finance Act, 1900 (1), the inalienable estates were in any event aggregable with other free and aggregable property.

It was alleged by the appellants that the inalienable estates passed under the will dated June 4, 1535, of George Nevill, described as the thirty-second Baron of Abergavenny or Burgavenny, who died on July 14, 1535. The following statement of facts with regard to these estates is taken from the considered judgment of the Master of the Rolls: "The 32nd Baron left a will containing several limitations affecting his property under which his son Henry who succeeded to the barony became tenant in tail of the estates. The next limitation was to Edward Nevill, the testator's brother, in tail male and under it he and his descendants would on the death of Henry without heirs male take estates in tail male. Henry did die having no heirs male, but after the matters which I now mention. Edward Nevill took part in a conspiracy and rebellion with the result that he was attainted and beheaded on January 12, 1538. The attainder is to be found set out in the petition. The result of that attainder was that all the interest of Edward Nevill under the will was forfeited to the Crown, and he and his descendants became corrupted in blood and incapable of succeeding to the estates. I do not think it necessary to examine the exact incidents of forfeiture and corruption of blood; it is enough to say broadly that though the will remained a valid instrument, Edward Nevill and his descendants became

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have been liable to Estate duty upon his death, the aggregation of such property, with other property passing upon the first-mentioned death, shall not operate to enhance the rate of duty payable either upon the settled property or upon any other property so passing by more than one half per cent. in excess of the rate at which duty would have been payable if such settled property had been treated as an estate by tself"

Finance Act, 1907, s 16: "In the case of persons dying on or after the nineteenth day of April nineteen hundred and seven, any settled property which would, under sub-section (2) of section twelve of the Finance Act, 1900, be aggregated with other property so as to enhance the rate of duty to the limited extent provided in that section, shall, for the purposes of the principal Act, instead of being so aggregated, be treated as an estate by itself."

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incapable of taking any benefit under it. In these circumstances Edward Nevill's son also named Edward obtained in 1542 an Act of Parliament of the 34 Hen. 8, No. 36, called an Act of Restitution. The important provisions of that Act are as follows: 'And also it may please your highness to ordain establish and enact by the advice of your lords spiritual and temporal and the commons in this your present parliament assembled and by the authority of the same that your said suppliant Edward Nevill be restored and enabled in name and blood as son and heir to the said Sir Edward and made heir to the same Sir Edward in name and blood and to all other to whom the same Sir Edward was heir or might have been heir if he had not been attainted and also be restored and enabled to inherit hold and enjoy all such honours castles manors lordships hundreds franchises liberties privileges advowsons nominations plantations knights fees lands tenements rents reversions services remainders portions annuities pensions rights possessions and all other hereditaments and possessions with their appurtenances whatsoever they be which at any time hereafter shall descend revert remain or come to the foresaid Edward Nevill the son as son and heir of the said Sir [Edward] Nevill or heir of the body of the said Sir Edward or heir or heir male of any ancestor of the said Sir Edward Nevill or of any of them as the said Edward the son should or might have done or had if the said attainder of the said Sir Edward Nevill had never been had or made.' It also contains this proviso: 'Provided always and be it enacted by the authority aforesaid that this Act of Restitution or anything therein contained shall not in any wise extend to restore or entitle the said Edward the son or any of his heirs in or to any honours castles manors lordships lands tenements rents reversions services remainders or other hereditaments or any parcel thereof which were the said late Sir Edward Nevill the father or which the King's highness hath or is entitled to have by reason of the attainder of the said Sir Edward or otherwise but that all the same honours castles manors lordships lands tenements and hereditaments with their appurtenances which were the said

late Sir Edward the father shall stand abide remain and continue in the same estate degree or condition as they were in before the making of this Act, and as though this Act of Restitution had never been had or made.' The exact effect of this proviso is not clear, but I do not think it is important. This Act was evidently not considered sufficient for in 1554 another Act of Parliament, 2 & 3 Ph. & M., No. 22, was obtained dealing with Edward Nevill's position. The Act is rather a long one, but I think the most important provisions are contained in the following passages. 'It may now please your Majesties of your most princely benignity and abundant grace at the most humble suit and petition of your said faithful subject and servant Edwarde Nevill esquire that it may be ordained established and enacted by your highness with the assent of the lords spiritual and temporal and the commons in this present parliament assembled and by authority of the same that as much of the said Act of Parliament holden at Westminster the said 22nd of January in the said 34th year of the reign of your most noble father King Henry 8, and there continued till the 12th day of May in the said 35th year of his reign as toucheth and concerneth the restitution of your said humble subject and servant Edwarde Nevill and every article branch and clause therein contained touching and concerning the said restitution may be ratified and confirmed And further that it may be established ordained and enacted by authority aforesaid that for lack of heirs male of the body of the right Honourable Henry Nevill knight now Lord of Abergavenny your said faithful subject and servant Edward Nevill esquire may have hold and enjoy to him and to the heirs male of his body lawfully begotten and to be begotten All and singular such honours castles baronies lordships manors lands tenements rents reversions services hundreds courts leetes views of frank pledge liberties privileges franchises forests parks chases warrens advowsons nominations plantations patronages knights fees woods underwoods commons fishings waters pensions portions annuities offices fees profits and commodities and hereditaments whatsoever and the reversion

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aud the remainder of the same which by the last will and testament of the right Honourable George Nevill knight late Lord Abergavenny deceased were willed given entailed or assigned in use or in possession for default of heirs male of the bodies of the said George Lord of Abergavenny and Lady Mary his wife lawfully begotten. And for lack of heirs male of the body of Sir Thomas Nevill knight deceased brother unto the said George Lord of Abergavenny to the said Sir Edward Nevill knight and to the heirs male of the body of the said Sir Edward lawfully begotten, anything contained or specified in the said act of parliament touching and concerning the restitution of your said humble subject and servant Edward Nevill esquire, or any saving proviso, or other article in the same Act contained, or in any other Act of Parliament or any other matter or cause to the contrary notwithstanding.'

"Then there follow a number of limitations and amongst them these provisions: 'And for default of such heir male of their several bodies lawfully begotten, that then all and singular the said honours manors lands tenements and other the premises shall descend remain and go unto the heirs of the body of the said George late Lord of Abergavenny, and for default of such heirs to the heirs of the body of the said Sir Thomas Nevill knight lawfully begotten according to the tenor and effect of the said last will of the said George late Lord of Abergavenny Provided always and be it further enacted by the authority aforesaid that if it shall fortune the said Henry now Lord of Abergavenny and your said subjects Edward Nevill Henry Nevill and George Nevill and either of them to decease without heirs males of the several bodies lawfully begotten, And also if the heirs of the body of the said George late Lord of Abergavenny fortune to decease without heirs of their body lawfully begotten, And also if the heirs of the body of the said Sir Thomas Nevill knight likewise fortune to decease without heirs of their bodies lawfully begotten any heirs or issue of the body of the said Sir Edward Nevill then living that then your highness our most dread sovereign lady

and your heirs and successors shall and may have hold and enjoy all and singular the said honours castles manors lordships lands tenements rentes reversions and other hereditaments before specified and the reversion and remainders of the same for and during all such and so long time and times as any of the said heirs or issue of the body of the said Sir Edward Nevill knight lawfully begotten should or ought to have had and enjoyed the same if the said Sir Edward Nevill had not been attainted, And that no feoffment discontinuance fine nor recovery with voucher or otherwise, or any other act or acts hereafter to be made done suffered or knowledged of the premises or of any part or parcel thereof by the said Henry Nevill now lord of Abergavenny Edward Nevill, Henry Nevill and George Nevill, or by any of them, or by any of the heirs male of their several bodies lawfully begotten, or by any of the heirs of the body of the said George late Lord of Abergavenny, or by any of the heirs of the body of the said Sir Thomas Nevill lawfully begotten or by any of them shall bind or conclude in right or put from entry your highness our Sovereign Lady your heirs and successors or any of the heirs in tail, or any to whom the premises or any parcel thereof should descend revert remain or come by virtue of the last Will of the said George late lord of Abergavenny.' "

The late Marquess of Abergavenny and his son the present Marquess were the direct descendants and heirs male of Sir Edward Nevill.

The petitions were heard before Sankey J. on June 28 and 29, 1921. His Lordship held that it could not be said, within the meaning of s. 12, sub-s. 2, of the Finance Act, 1900, that the inalienable estates passed under the disposition made by the will of the thirty-second baron in 1535. In his Lordship's opinion they really passed in consequence of the Act of 2 & 3 Ph. & M., No. 22. If they did not pass by that Act they passed by the joint operation of that Act and the will. They did not pass merely by the disposition made by the will. The first point therefore failed. His Lordship then referred to the contentions raised on the question of

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aggregation and said: "My view of s. 5 of the Act of 1894 is this: It is very difficult to express it in language, but I think it does deal with a certain class of property which is referred to in it, possibly of the character that we have under discussion in this case. I think it then goes on to make certain—I do not know quite how to describe them—regulations some of which perhaps are contrary to the fact, not with regard to the property but with regard to the way in which it is to be treated. It first provides that 'the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels,' and then I think it goes on to provide for a special way of ascertaining the value of this particular class of property. But it is a special way of valuing for the purposes of estate duty, and therefore I do not think it is possible to say that only some part of s. 1 applies. My view is that s. 1 does apply altogether, and that as far as s. 4 is concerned, it is not a separate section in one sense, but is simply a section in aid of s. 1 and part of the machinery for charging, and I think, if you decide that s. 1 does apply to an estate of the character under discussion, you must say that s. 4 also applies. Sect. 1 is the grant of estate duty and s. 4 provides that 'for determining the rate of estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which estate duty is leviable shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof.' I am aware that the decision of the character I am giving is not a courageous one, but the real reason of my giving it is that I do not think it is wise to decide any point which is not immediately raised, and going back to these words in s. 5 'the provisions of this Act with respect to settled property shall not apply.' I am not going to say which of the provisions do not apply. What I am going to say is that the provisions of ss. 1 and 4 do apply. For these reasons I think that the second point must be decided against the petitioners, and that in this

case the Crown is right." His Lordship accordingly dismissed the petitions.

The petitioners appealed. The two appeals were heard together on November 22, 23, 24, 1922.

Tomlin K.C., *Ashworth James* and *Micklethwaite* for the appellant in the first appeal, and *Ashworth James* and *Micklethwaite* for the appellants in the second appeal. The property comprised in the inalienable estates is not liable to be aggregated with the marriage settlement funds and the property passing under the will.

First, it is submitted that the inalienable estates passed or are deemed to pass under a disposition made by a person dying before the passing of the Finance Act, 1900, and by s. 12 of that Act coupled with s. 16 of the Finance Act, 1907, they are not to be aggregated with other property, but are to be treated as an estate by themselves. Those estates passed under the dispositions made by the will of George thirty-second Baron of Abergavenny, who died in 1535. The effect of the Act of 2 & 3 Ph. & M., No. 22, was to restore the status quo ante. It was regarded as a restoration in blood and estate. The past was altogether blotted out, and Edward Nevill and his successors took their interests under the will of the thirty-second baron with the restriction on alienation imposed by the statute. The estates have since descended under the dispositions made by the will.

Secondly, it is submitted, upon construction of s. 5, sub-s. 5, read in conjunction with ss. 1 and 4 of the Finance Act, 1894, that the inalienable estates are not subject to aggregation with any other property. By s. 5, sub-s. 5, where lands and chattels are so settled by Act of Parliament or royal grant that no one of the persons successively in possession is capable of alienating the same the provisions of the Act with respect to settled property, and the property passing on the death of any person in possession shall be the interest of his successor in the lands and chattels, and such interest shall be valued for estate duty in like manner as for succession duty. Then the proviso to s. 4 says that the property passing

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on a death under s. 1 in which the deceased never had an interest, or which under a disposition not made by the deceased passes immediately to some person other than the wife or husband or lineal ancestor or lineal descendant of the deceased shall not be aggregated with any other property but shall be an estate by itself. Inasmuch as the property which passes on the death of any person in possession of the lands and chattels is the interest of his successor therein, it is therefore a property in which the deceased never had an interest, and is not to be aggregated with any other property. The case falls within the precise provisions of the statute, and its language ought not to be so twisted as to make the subject liable to tax when according to its literal terms he would not be so: *Attorney-General* v. *Thynne* (1); *Greenwood* v. *F. L. Smidth & Co.* (2) The Court is bound to give express effect to the language of the statute.

[They also referred to *Partington* v. *Attorney-General* (3); *In re Bolton Estates Act*, 1863 (4); and the Finance Act, 1922 (12 & 13 Geo. 5, c. 17), s. 44.]

Sir Ernest Pollock K.C. and *Sheldon* for the Crown in both appeals. On the second point raised by the appellants, it is submitted that s. 5 is really a valuation section. In these cases the question is upon what is the person to pay? It must be the principal value of the property which passes on the death. There is an antithesis in the section between settled property in the ordinary sense, and the particular class of property with which we are dealing in this case—namely, lands and chattels so settled by Act of Parliament or royal grant as to be inalienable.

It is said that the deceased cannot have had any interest in the property which passed on the death, because that is an interest of his successor. But see the observations of Lord Selborne in *Earl of Zetland* v. *Lord Advocate*. (5)

The interest which passes is to be deemed to be the interest of the successor. The words of the section cannot be

(1) [1914] 1 K. B. 351.
(2) [1922] 1 A. C. 417, 423.
(3) [1869] L. R. 4 H. L. 100.
(4) [1904] 2 Ch. 289.
(5) (1878) 3 App. Cas. 505, 518.

construed as they stand having regard to the object of the section, which is valuation. For the purpose of ascertaining the amount of the estate duty payable the actual land and chattels must be taken as passing. Sect. 44 of the Finance Act, 1922, shows that although the lands are inalienable they pass on the death.

On the first point it is submitted that the inalienable estates passed under the disposition contained in the Act of 2 Ph. & M. and not under that contained in the will. That Act created new limitations, which are not the same as those in the will.

Tomlin K.C. replied on the first appeal and *Ashworth James* on the second.

Cur. adv. vult.

Feb. 20. The following written judgments were delivered :—

LORD STERNDALE M.R. These two appeals from Sankey J. raise questions of some difficulty relating to the estate duty payable in respect of the estate of the late Marquess of Abergavenny who died on December 12, 1915.

The two petitions raise the same questions, the former being presented by the surviving trustee of the marquess's marriage settlement, the second by the executors of his will, and the point to be decided is whether the property comprised in the marriage settlement, and the property comprised in the will are for purposes of estate duty to be aggregated with certain inalienable estates. [His Lordship read ss. 1 and 4 of the Finance Act, 1894, s. 12, sub-s. 12, of the Finance Act, 1900, and s. 16 of the Finance Act, 1907, and continued :] These are the only sections to which I need refer for the purpose of dealing with the first question in the appeals.

It may be shortly stated thus. The appellants contend that the inalienable estates before mentioned passed under a disposition made by a person dying before the passing of any of the Finance Acts mentioned. They allege that they passed under the will of George described as the thirty-second Baron of Abergavenny. I do not think that such description means that he was the thirty-second holder of the hereditary

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title of Baron Abergavenny, and I do not think it necessary to consider why he is so called. He died in 1535, therefore before the passing of any of these Acts and in order to deal with the first question it is necessary to mention some facts arising in the history of the family of Nevill. I shall do so shortly, because the details are to be found in the agreed statement of facts upon which the case was argued, and in the judgment of Sankey J. [His Lordship stated the facts as above set out and continued :]

It is by virtue of this will and these Acts of Parliament that it is argued that the inalienable estates pass under the dispositions of the will. I do not think they do. As I have already said the will remained valid, the testator being in no way concerned with the attainder, but Edward Nevill and his descendants were rendered incapable of taking any benefit under it. I think that when the Acts of Parliament are properly considered it is fairly clear that it is under them, especially that of 2 & 3 Ph. & M., No. 22, that the present and the late Marquesses, who are direct descendants of Edward Nevill, take the estates. When these Acts of Parliament were passed it would have been very easy to provide that on the restoration and ennobling in blood of Edward Nevill and his descendants they should inherit and take all estates or interest given to them by the will of the thirty-second Baron. No such provision is to be found in either Act. That of 34 Hen. 8, No. 36, makes no mention whatever of the will, and that of 2 & 3 Ph. & M., No. 22, mentions it in my opinion simply as a means of identifying certain matters mentioned in the Act of Parliament. The Act contains in itself the limitations affecting the estates, and though these limitations are no doubt derived from those contained in the will and based on them they are not the same. In the first place the limitation in the will is to the heirs male of Edward Nevill, the father, in the Act to those of Edward Nevill the son. Again some of the limitations contained in the will had become inoperative, for example, that to Henry Lord Montague, who had also been attainted and executed leaving no heirs male. They are omitted, and in two instances at least the

provisions of the will are substantially altered. I have already read two passages in which these alterations are contained. In the first it is provided that if Henry then Lord of Abergavenny, Edward Nevill the son, Henry and George his brothers should die having no heirs male of their body, and the heirs of George late Lord of Abergavenny should die leaving no heirs of their body then the estates should belong to the Crown so long as any heirs or issue of the body of Sir Edward Nevill should live. The second passage provides that the estates shall be inalienable, and was inserted no doubt to ensure that the former provision should not be defeated by any alienation made by a person who took the estates in tail male. These considerations lead me to the conclusion that the intention was that Edward Nevill, the son, and his descendants should take the estates according to the limitations contained in the Act of Parliament and not according to those contained in the will, although the former were no doubt framed after consideration of and in relation to the latter, and that the inalienable estates passed to the present Marquess under the provisions of the Act of Parliament and not under a disposition made by the thirty-second Baron. The first point made by the appellants therefore fails.

The second point is quite different and arises under the provisions of s. 5, sub-s. 5, of the Act of 1894 considered in conjunction with those of ss. 1 and 4 of that Act. The last two sections I have already mentioned. Sect. 5, sub-s. 5, is as follows: "Where any lands or chattels are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession thereof is capable of alienating the same, whether his interest is in law a tenancy for life or a tenancy in tail, the provisions of this Act with respect to settled property shall not apply, and the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued, for the purpose of Estate duty, in like manner as for the purpose of Succession duty." The point made by the appellants is that as the

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property which passes on the death of any person in possession of the lands and chattels is the interest of his successor in them it is necessarily a property in which the deceased never had an interest, and therefore is not to be aggregated with any other property.

The section is a difficult one to construe, and I think very little consideration will show that its language cannot be taken literally and without qualification. It first enacts that the provisions as to settled property shall not apply to such inalienable estates, and if that be taken literally and generally the provisions of s. 1, so far as they apply to settled property, do not apply, and as there is no other charging section such estates escape duty altogether. This construction was however disclaimed by the appellants, who argued that the result of this provision in sub-s. 5 was to make such inalienable estates unsettled property for the purposes of the Act, and therefore chargeable as such. I do not think that can be correct, for the sub-section itself speaks of them as settled by Act of Parliament or royal grant. The result is that some limitation must be put upon the words. I do not think it is necessary to determine precisely what that limitation must be, for this case turns not upon those words but upon some that follow, but the importance of it is that it shows that this sub-section cannot be read literally. Considering that at the time this section, which is described as a section dealing with settled property, was passed, there was chargeable, under sub-s. 1, now repealed, upon settled property a duty called settlement estate duty, which was quite inapplicable to inalienable estates, I am inclined to think that the limitation should be to the provisions of s. 5, but it is not necessary to determine it.

The important provision for the purposes of this case is that following the one I have just mentioned, that is, "the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor," and so on.

The question is what is the proper meaning of these words? The appellants contend that they must be read literally, and so read they mean that there is by this sub-section brought

into existence a kind of property passing on the death in addition to those mentioned by Lord Macnaghten in his well-known judgment in *Earl Cowley* v. *Inland Revenue Commissioners.* (1) This kind of property they then argue coming into existence only after the predecessor's death cannot be one in which he had an interest, and cannot therefore be aggregated. I think this fairly represents the appellants' contention. The respondents' argument may be thus stated. The section cannot be read literally. An interest which does not come into existence till after the death cannot pass on the death, therefore the words ot the section must be qualified in some way, and the proper qualification is that the property passing on the death shall for valuation purposes, or for the purpose of ascertaining the principal value, be deemed to be the interest of the successor. It is necessary first to see whether the words can be read literally, and, if not, what is the proper limitation. No doubt Lord Macnaghten in his description of the property passing on the death had not this sub-section in mind, and his description is not necessarily exhaustive, but it does seem improbable that an addition to what was called by the learned counsel for the appellants the taxable subjects should be made in a sub-section of a section relating to certain exceptions from the usual charge under s. 1 made in the case of settled property. The scheme of s. 5 seems to be that settled property being property in which one or more than one limited interest is created and which, to use the learned counsel's expression, comes home after the expiration of limited interests, shall be subject not to the usual estate duty but to what was called settlement estate duty. In the case however of perpetual limited interests the property never comes home, and therefore cannot be treated like ordinary settled estate. In stating how it is to be treated it is very unlikely that a new taxable subject in addition to these mentioned in ss. 1 and 2 would be created, and more likely that the provision should be for the purpose of ascertaining the charge upon the peculiar class of settled property under discussion. Still if a section

(1) [1899] A. C. 198, 211.

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can be read literally it must be done whatever the probabilities or consequences. In my opinion it is only necessary to read the sub-section to see that in this latter part as in the former it is impossible so to read it. The interest of the successor, which means his interest in possession, has no existence till after the death, and a thing which does not exist till after the death cannot pass on the death and no Act of Parliament can make it do so. To use a homely illustration put by one of the learned counsel during the argument, an Act of Parliament cannot make a horse a cow, but it can provide that for the purposes of the Act or some of them, or for other purposes, a horse shall be deemed to be or considered or treated as a cow. So here I think the section must be read as meaning that the property passing, etc., shall be deemed or considered to be the interest of the successor and shall be valued as provided therein. The appellants proposed to substitute for the words "the property passing," etc., "the taxable subject," but that is not reading the section literally, it is substituting one expression for another, and is a greater departure from the literal words than that which I think is the right construction. To read "shall be deemed to be" for "shall be" seems to me a necessity for the reasons I have given and follows the words used in s. 2 with regard to property which does not in fact change hands on the death. This reading does not however solve the difficulty, for there remains the question for what purposes it is to be deemed to be property passing. To that the answer of the appellants would no doubt be, for all the purposes of the Act, if they admitted the reading, which they do not, and if that be the correct answer the effect is the same as a literal reading, if such were possible. The respondents on the other hand contend that the reading must be for the purposes of valuation, or of ascertaining the capital value. I do not see how the appellants' reading can be maintained. If the interest of the successor be deemed to be the property passing on the death for all purposes of the Act I do not see how there can be any other property which can pass or be deemed to pass. But nothing seems

to me to be clearer than that there is another property which passes—i.e., the lands and chattels themselves. They do in fact change hands, and it is essential for the working of the sub-section that they should. The charge is to attach on the death of any person in possession of the lands and chattels, and the section therefore contemplates a succession of persons, say A., B., C., D., who are in possession of them, upon the death of each of whom the next comes into possession. If this be not so then though on the death of A. who was in possession there is a succession to B., on his death there can be none, for B. was not a person in possession of the lands and chattels. That the lands and chattels do pass seems to me to be the plain result of the section, and it is recognized by the Legislature in s. 44 of the Finance Act, 1922. I need not read the section. It speaks of the lands or chattels as passing on the death.

This Act is not of course to be used for construing the previous Act, but it is valuable as showing that the Legislature recognizes the fact which I should have thought without it was quite plain—i.e., that in the case of these inalienable estates the lands and chattels do pass on the death of each holder of the inalienable interest in them. The result seems to me to be that the interest of the successor is not to be deemed the property passing on the death for all purposes of the Act or the only property passing. For some purposes, and some important purposes, the lands and chattels themselves pass and are recognized by the Act as passing and therefore some further limitation must be put on the words of the sub-section. I have already indicated what I think should be the limitation—i.e., for the purpose of valuation in ascertaining the capital value. I recognize the difficulty arising not only from the words but from the frame of the section—namely, the statement that the property passing on the death shall be the interest of the successor, and then the further statement of the method of valuation, and I recognize that the conclusion to which I have come is open to the criticism that it gives little weight to the first statement and might be carried out by the second alone,

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but when it is ascertained, as I think it is, that the first statement must be qualified, and cannot mean that the property passing on the death shall be deemed for all purposes to be the interest of the successor, in my opinion the force of such criticism is gone. I think that when the interpretation which I think is the right one is put upon the sub-section it will be seen that it works harmoniously with the rest of the section in its dealings with settled property instead of setting up a new taxable subject as it is called by a sub-section of a section which is dealing with the method of charging settled estates, although there are two sections (ss. 1 and 2) which are passed for the very purpose of defining the taxable subjects. I think the appeals should be dismissed with costs.

WARRINGTON L.J. The question in this case is whether the value, ascertained as directed by the Finance Act, 1894, of the interest of the successor to the late Marquess of Abergavenny in certain lands so settled by Act of Parliament that no one of the persons successively in possession thereof is capable of alienating the same, is to be aggregated with the principal value of other property passing on the death of the marquis or is to be an estate by itself. Sankey J. has decided in favour of the Crown. There are two appeals both raising the same question; one is by the surviving trustee of the marriage settlement of the late Marquess, the other is by his executors.

The appellants make two points. First, they say that according to the true construction of the Finance Act, 1894, the interest of his successor is property in which the third Marquess never had an interest and therefore by virtue of the proviso to s. 4, is not to be aggregated with other property, and secondly, they contend that the lands in question passed on the death of the Marquess under a disposition made by a person dying before the commencement of Part I. of the Finance Act, 1894—in this case George, Baron Burgavenny, who died in 1535—and therefore by virtue of s. 12 of the Finance Act, 1900, and s. 16 of the Finance Act, 1907, are not to be aggregated with any other property. On this point

the Crown contend that the lands did not pass under the disposition made by George, Baron Burgavenny, but under the Act 2 Ph. & M., No. 22, by which the successive interests were made inalienable.

If the first point is decided in favour of the appellants, the second point becomes immaterial.

Sect. 1 of the Finance Act, 1894, provides that in the case of every person dying after the commencement of Part I. of the Act there shall be levied and paid upon the principal value, ascertained as therein provided, of all property real or personal settled or not settled which passes on the death of such person, a duty called estate duty.

From this section I think it is clear that the Legislature have selected the expression "property which passes on the death" to describe the property on which the duty is to be levied, in other words, the subject of taxation. It is also clear that "property" here means in the case of realty the actual lands, houses and so forth, and that "property which passes on the death" has its natural and ordinary meaning of property which having during his life belonged for some estate or interest to one person, passes on his death to another. Sect. 2 provides that property passing on the death of the deceased shall be deemed to include certain descriptions of property which would not in ordinary parlance be said to pass on the death of a deceased person—e.g., property in which the deceased had an interest ceasing on his death. As to these two sections and their effect, it is enough to refer, in support of what I have said, to the speech of Lord Macnaghten in *Earl Cowley* v. *Inland Revenue Commissioners.* (1)

The principle of aggregation for the purposes of estate duty is established by s. 4, which is in the following terms: "For determining the rate of Estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which Estate duty is leviable shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value

(1) [1899] A. C. 198, 211, 212.

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thereof: Provided that any property so passing, in which the deceased never had an interest . . . . shall not be aggregated with any other property but shall be an estate by itself, and the Estate duty shall be levied at the proper graduated rate on the principal value thereof."

The property referred to in this proviso as property passing on the death in which the deceased never had an interest, is obviously not property so passing in the ordinary sense, but property which under the provisions of the Act is in some way brought within the force of that expression and so made the subject of taxation. Up to this point the only property not passing on the death in the ordinary and natural sense which is brought within the force of the expression, is property which under s. 2 is to be deemed to be included in it.

But we now come to s. 5, which gives rise to the question to be decided. It contains in the first four sub-sections a number of provisions relating to settled property, and in particular it imposes the settlement Estate duty, since repealed, and then at the end of the section, sub-s. 5, which is in the following terms: "Where any lands or chattels are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession thereof is capable of alienating the same, whether his interest is in law a tenancy for life or a tenancy in tail, the provisions of this Act with respect to settled property shall not apply, and the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued, for the purpose of Estate duty, in like manner as for the purpose of Succession duty."

This sub-section, whatever else it does, in terms brings within the operation of s. 1 and makes subject to the duty as property passing on the death, an item of property different altogether from any previously made subject to it—different in two respects—first, that it is an interest in land and not the land itself, and secondly, that in the ordinary meaning of the words it does not pass on the death. But the section says that in dealing with the particular case referred to "the

property passing on the death "—that is to say, that which by force of s. 1 is the subject of taxation—shall be the interest of the successor. Obviously, however, the substitution of an interest in land for the land itself as the subject of taxation made it necessary to modify not only the mode of valuation, but the nature of the thing to be valued, and accordingly the section provides that the interest only and not the lands shall be valued and prescribes the mode of valuation by reference to succession duty.

What is the effect on s. 4? The aggregation there referred to is that of all property passing on the death in respect of which estate duty is leviable. It is only because the property passing on the death in respect of which the duty is leviable is, in the case of the special settlements referred to in s. 5, sub-s. 5, the interest of the successor that such interest is brought within the principle of aggregation at all. It seems to me to follow that this interest must come within the expression "property passing on the death" in the proviso, and if so, inasmuch as it is the interest of the successor of the deceased, it is property in which the deceased never had an interest and therefore is not to be aggregated with other property passing on his death, but is to be an estate by itself.

The late Marquess was tenant in tail male in possession of the settled lands, and on his death they passed to his heir in tail male. It is no doubt true that in law the estate of the heir is the same estate as that of the ancestor, but in the case of the statute now in question it is the interest of the heir and that alone upon which the duty is leviable and which would thus, but for the proviso, be brought within the principle of aggregation, and in that the late Marquess never had an interest.

I am quite unable to accept the contention of the Crown that s. 5, sub-s. 5, is a valuation section only. In the view I take the provision as to valuation is merely the necessary consequence of the substitution for the land itself as the subject of taxation of an interest in the land. It seems to me that the words in s. 5, sub-s. 5, "The provisions of this Act with regard to settled property shall not apply," have

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no bearing on the question, but I may say this, that the sub-section does not say "the property shall not be settled property or be deemed to be settled property" or anything of that kind, and it is clear that "the interest of the successor" is to be subject to estate duty under s. 1. I think the object and effect of the provision is to exempt the lands and chattels from the special provisions of the Act as to settled property, and particularly from those contained in the preceding sub-section of s. 5 itself.

With regard to s. 44 of the Act of 1922, I do not think that this can be relied upon to affect the construction of the Act of 1894, but in my opinion it does not in fact do so. It makes it possible to charge on the corpus of settled lands a duty which is leviable in respect of a particular interest therein, and it refers to the lands as passing on the death of the predecessor as in the ordinary and natural effect of the words they in fact do, but that the lands are for the particular purpose so referred to does not in my opinion detract from the force of the expressions used in s. 5, sub-s. 5, of the Act of 1894 creating, as in my opinion they do, a special subject of taxation in the particular case.

On the construction of the Act of 1894, therefore, I am of opinion that in each case the order appealed from should be reversed, but as my brethren take the opposite view the appeal will be dismissed.

In the view I take of the construction of the Finance Act, 1894, it is unnecessary to consider the second point raised by the appellants, but as it was argued, I will very shortly state my conclusions on it.

The question is, did the property pass under the disposition made by the will of George, Baron of Burgavenny, who died in 1535, or under that made by the Act 2 & 3 Ph. & M., No. 22? In my opinion they passed under the disposition made by the Act. I refer to one circumstance only, among several, which is in my opinion enough to establish the proposition. Under the will the hereditaments were limited to the use of Sir Edward Nevill in tail male; under the Act they are limited to his son Edward Nevill in tail male. The son Edward,

therefore, takes under the Act by purchase and under the will by inheritance, and the practical result is that if the issue male of the son Edward had failed the hereditaments would under the will have passed to the other issue male, if any, of his father, Sir Edward, by inheritance, whereas under the Act they would pass to the two other named sons of Sir Edward in tail male by purchase. Moreover, the limitation contained in the will to Sir Edward in tail general is omitted from the Act. These alterations in the dispositions seem to be quite enough to support the view that the property passes under the disposition made by the Act, and not under that made by the will.

YOUNGER L.J. The appellants in these two appeals desire to have it declared that neither the Eridge Estate of the late Marquess of Abergavenny nor any interest in it, was, when he died, liable to be aggregated for the purposes of estate duty with any other property which passed on his death. That estate or interest must, so the appellants contend, be regarded for estate duty purposes as an estate by itself.

At the hearing before us the appellants sought to obtain that declaration by the presentation of two lines of argument each independent, as they urged, of the other. Their claim could be maintained, so they said, either by reference to s. 5, sub-s. 5, and the proviso to s. 4 of the Finance Act, 1894, or, at their option and as an entirely separate contention, by reference to s. 12, sub-s. 2, of the Finance Act, 1900, and s. 16 of the Finance Act, 1907. And, while they acknowledged that they could not hope to bring themselves within the benefit of the later set of sections until they had affirmatively established by a careful examination of the documents that the Eridge Estate was settled property which in fact passed on the death of the late Marquess under a disposition contained in the will of the so-called thirty-second Baron, they claimed to be entitled merely by drawing the Court's attention to the restriction upon alienation contained in the Act of Ph. & M. to treat it as established, without the necessity

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for any further detailed investigation, that the Eridge Estate was and remained within the meaning of s. 5, sub-s. 5, of the Act of 1894 "so settled by Act of Parliament that no one of the persons successively in possession thereof is capable of alienating the same," and that whether or not the estate came also within the benefit of the later statutes. In other words, the nice question whether the Eridge Estate has since the sixteenth century devolved under the testamentary dispositions of the thirty-second Baron or under a settlement contained in the Act of Ph. & M. did not in the appellants' view arise for consideration until, having exhausted the possibilities of s. 5, sub-s. 5, of the Act of 1894, they sought to base their claim on s. 12 of the Act of 1900.

I can find no support anywhere for this position. The appellants can no more under s. 5, sub-s. 5, of the Act of 1894 than they can under s. 12 of the Act of 1900 make any case of escape from aggregation until the question, whether the estate is settled by the will or by the statute, has been definitely answered. If it is found that the estates are settled by the will, then the appellants may be able to bring their case within s. 12 of the Act of 1900, but they can in nowise bring it under s. 5, sub-s. 5, of the Act of 1894. If, on the other hand, the estates are found to be settled by the statute, then the appellants' claim cannot be brought within s. 12; it may or may not come under s. 5, sub-s. 5, and s. 4 of the Act of 1894. The appellants' claim, in short, may not be supported by either set of sections; but it cannot be supported by both, a conclusion which almost stands to reason, if it be remembered that the duty imposed in cases falling under one set of sections is different in amount and is arrived at by a different measure from the duty imposed in cases falling under the other set.

The justification for the appellants' contrary view rests upon the contention that sub-s. 5 of s. 5 of the Act of 1894 extends and applies as much to lands settled by deed, will, or other private instrument as to lands settled by Act of Parliament or royal grant if only there be imposed by such Act or grant a restriction upon any person successively

entitled under the private instrument of settlement precluding him from alienating the lands settled by it. That is not, I think, a true view of s. 5, sub-s. 5, and, incidentally, I may observe that it is not the view of it taken by the Legislature in s. 44 of the Act of 1922, to which I shall have to call attention in another connection later on. It would seem plain enough that before lands can come within the ambit of the sub-section they must, and in the proper sense of the term, be settled by the Act of Parliament or royal grant itself, and lands cannot, I should suppose, be said to be so settled if, in fact, the only effect of the Act or grant upon them is to prohibit their alienation by the persons whose title to possession in succession is conferred and defined by some other instrument of settlement altogether. In the present case, as it turns out, the position on this point taken up by the appellants has not really mattered in the view which this Court takes of the question whether or not the Eridge Estate, as settled at the death of the late Marquess, was still passing under the will of the thirty-second Baron. But had that view been different the whole of the elaborate argument on s. 5, sub-s. 5, would have been wasted, and it seems still desirable, in the interests of clearness if for no other reason, to emphasise the fact that in this and all cases like it this basic question must always be answered before any further progress is possible.

Although, however, the necessary investigation is troublesome, the answer to the question in this case is, I think, not doubtful. The Eridge Estate, in my view, has never since the Act of Ph. & M. passed under any other title than one of which that statute was the root. Paraphrasing the language of s. 12 of the Finance Act, 1900, that estate has not since passed under any disposition of it made by a person dying before the Finance Act, 1894. Since the Act of Ph. & M. it has passed, and it is still held, under a disposition made by that Act, in which also is contained the restriction which, within the meaning of s. 5, sub-s. 5, prevents any person successively in possession of the property from alienating it. The estate therefore comes under that section

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and for the very reason which prevents it from coming under the other.

I so fully agree with the judgments on this branch of the case which have just been delivered that I content myself with only one additional observation in support of this conclusion. It is not, I think, possible to read the statute of Ph. & M. without feeling satisfied that the members of the Nevill family entitled in succession in accordance with its provisions to the Eridge Estate take that estate under these provisions proprio vigore. Apart from them they have no title to the Estate at all. The will of the thirty-second Baron may be the origin of the statutory limitations. Very clearly, I think it is. But whatever their origin it is these limitations alone which since the statute was passed have mattered at all. In relation to the will they reproduce, but they also withhold. Had there in any instance been any divergence between the will and the statute either in the estate to be taken or in the person to take, the statute and not the will must have prevailed. Had there been any cloud on the birth of any Nevill named in the statute, his title thereunder would have been unaffected. Very different might have been his position had his claim arisen under the will.

In the result therefore I am satisfied that we have here no concern with s. 12 of the Act of 1900. The appellants have, however, brought their case within the terms of s. 5, sub-s. 5, of the Act of 1894, and the issue of their appeals depends upon the answer to the question whether or not they are right in the view they present as to the meaning and effect of that sub-section, more especially in its relation to s. 4 of the Act. The question, so posed, is, like most similar questions arising on the interpretation of statutes, not an easy one, and much of its difficulty may well be due to a fact alluded to by Mr. Vaughan Hawkins in his argument for the Crown in *In re Bolton Estates Act*, 1863 (1), that the sub-section was itself an afterthought drafted at a later date than the rest of the section, and probably, I should conjecture, by a different

(1) [1904] 2 Ch. 289, 297.

hand. Difficulties of language, however, to whatsoever cause attributable, exist only to be judicially surmounted, but being, as they are, formidable, it is fortunate that by the well-known judgment of Lord Macnaghten in *Earl Cowley* v. *Inland Revenue Commissioners* (1), in which he explained the scheme and effects of the Finance Act, 1894, we are here, as I think, greatly assisted to their solution.

It will, perhaps, be useful to paraphrase now such passages of that judgment as do tend to elucidate the construction of the sub-section here in debate. Sect. 1 of the statute, said Lord Macnaghten, deals with the ordinary and normal case of property passing or changing hands on death. The Act has in view, for the purpose of taxation, the property so passing; it does not regard the interest of the deceased in property which, if it be a limited interest ceasing with his death, can never pass. But while s. 1 deals with the normal case just referred to, s. 2 is quite different. That section declares that the expression "property passing on the death of the deceased" shall be deemed to include property classified under four different heads to no one of which rightly understood is that expression literally applicable. The two sections are, therefore, mutually exclusive. Sect. 1 might properly be headed: "With regard to property passing on death be it enacted as follows." Sect. 2 might with equal propriety be headed: "And with regard to property not passing on death be it enacted as follows." It is s. 1 and not s. 2, expressly and in terms, which applies to settled property, and this is what you would expect for the very reason that the Act is dealing with property which passes on death and not with the interest of the deceased in it. Settled property does within the scope and terminology of the Act pass on death; because it changes hands on death none the less that the life estate, or other limited interest of the preceding owner, must have upon his death ceased for good and all. So far Lord Macnaghten.

Now certain relevant conclusions emerge from this authoritative deliverance, concurred in as it was by Lord Davey

(1) [1899] A. C. 198, 211.

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and Lord Shand, and in no way qualified by the other Lords then present. The most important is this, that within the terminology of the Act no property is property therein described as "passing on death" in any of the moods and tenses of that expression, unless it be either (*a*) property settled or unsettled which actually "changes hands," that is, passes from the hands of the propositus under s. 1; or (*b*) property which, without necessarily so changing hands, is to be deemed to pass on death in the four cases mentioned in s. 2. From this two further conclusions may, it seems to me, be reached: (1.) It would be in conflict with the terminology of the statute, contrary to what I may term its dictionary meaning, to apply the phrase to any other property. The Legislature can alone increase the number of cases to be brought within the scope of s. 2. It has not done so in this statute. It has not done so in s. 5. It is not the least formidable of the objections to the appellants' view of s. 5, sub-s. 5, to which we are coming, that it obliges them to strip off their dictionary sense the words in the sub-section "property passing on the death" and leaves them powerless to reclothe the words with any sense at all. (2.) "Property passing on his death in which the deceased never had an interest," which are the words of s. 4, can, so far, apply and extend only to the cases in s. 2, and not indeed to all of these. The words, for instance, can never be applicable to a case covered by the first alternative of sub-s. 1 (*b*): "property in which the deceased had an interest ceasing on the death of the deceased."

Lastly there are two definitions contained in the Act (s. 22, sub-s. 1) which must be borne in mind in interpreting the effect of s. 5, sub-s. 5. I mean the definitions of the words "property" and "settled property." By s. 22, sub-s. 1 (*f*), "The expression 'property' includes real property and personal property and the proceeds of sale thereof respectively and any money or investment for the time being representing the proceeds of sale," (*h*) "The expression 'settled property' means property comprised in a settlement," definitions which strikingly confirm Lord Macnaghten's

statement that the Act is dealing with property which passes on death and not with any estate or interest of the deceased or, I may add, of any other person in such property.

We are now in a position to proceed to the consideration of s. 5 itself, and particularly to sub-s. 5 of that section, with which, as has already appeared, we have in this case mainly to do. Sect. 5, which, as is shown in the sidenote, is dealing with "settled property," has a very distinctive place in the scheme of the statute. In its first four sub-sections, which deal with property passing under an ordinary settlement, it is conceding some relief from the charge imposed by s. 1. But for these sub-sections a full duty calculated on the principal value of the property passing would have been chargeable on every death of every successive limited owner. Under s. 5, however, in its earlier sub-sections, only one full duty so arrived at together with one charge of settlement estate duty is to be levied on the entire passage of a settled estate from one deceased person competent to dispose of it to another person so competent. No further duty is chargeable, however numerous may be the limited owners upon whom the property in its passage from the one owner to the other successively devolves. Sub-s. 5 deals with a special kind of settled property—namely, settled property of which no owner is ever competent to dispose. To this special variant the scheme of the earlier sections is manifestly inapplicable; for as in these special cases no owner ever is competent to dispose, it would follow that possibly neither estate nor settlement estate duty would under that scheme ever have been in these cases leviable at all. Be that, however, as it may, this at least seems certain, that so soon as one estate duty and one settlement estate duty has been paid in respect of the property passing, no further duty could ever again in these cases be charged. The fear of such consequences was evidently too much for the Legislature and sub-s. 5 resulted as, it has been suggested, an afterthought. If the scheme of the statute were to be followed some duty had to be charged, and on every death in the case of these special settlements, for every owner was in

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interest the same. On the other hand, these successive owners were never absolute owners and their successive interests were never more than interests in an unbarrable entail, while they might be no more than successive tenancies for life. It would, therefore, as regards them have been in disconformity with the scheme of the Act of 1894, which did make allowances in respect of succession to limited interests to charge on the death of each one of these limited owners a full estate duty calculated on the principal value of the entirety of the settled estate. The duty to be charged on each death accordingly would properly be different from one on the principal value of the entirety, and sub-s. 5 prescribes how the amount of the duty in fact to be charged on each death is in such cases to be arrived at.

Now so far as the rights, outside the Act altogether, of these successive owners in this special variety of settled property are concerned, their position is in no way different from that of limited owners in their succession to an ordinary settled estate. They may not alienate the estate; that is the only difference. The property itself passes to them on the death of the predecessor, just as it does in the other case, when of course, I need hardly say, it is aggregated under s. 4 of the Act with all other property passing on the death of the predecessor.

Although, therefore, there seems no reason, in principle, why the principle of aggregation should not apply in this case as in the other, the great question between the parties here is whether the Legislature in s. 5, sub-s. 5, has, in fact, made applicable to this specially settled property a method of charge which excludes aggregation altogether. It is not, I think, suggested that this result can have been the aim of the method adopted. The difficulty in applying the language of s. 5, sub-s. 5, to the proviso to s. 4 to be alluded to later shows quite clearly that if there be in these cases any connection between the two, the connection is merely a bye-product of s. 5, sub-s. 5, and quite accidental. Nor can any other reason for the adoption by the Legislature of the method of charge which the appellants

say it has here adopted be conjectured. Yet the method attributed to the Legislature by the appellants is indeed extraordinary if Lord Macnaghten's observations be remembered; for, according to the appellants' view of the sub-section, the Legislature has in this one instance, and for no apparent reason, disregarded entirely the property "changing hands" on the death of the deceased and has selected as "the taxable subject"—to use Mr. Tomlin's phrase—the interest in the property of his successor and has charged that interest alone with the duty. In that taxable subject the deceased never had an interest; therefore, so the argument proceeds, it is not liable to aggregation under s. 4; it must be treated as an estate by itself. The appellants agree, I think, that the scheme is a strange one. It is, indeed, almost gratuitously eccentric. But its acceptance results necessarily, so they say, from a literal construction of the words used, to which alone it is permissible for the Court to have recourse in dealing with a taxing Act, and they cite *Partington* v. *Attorney-General.* (1)

To this position two answers are presented to us. The first is that the literal construction—by which, of course, is meant a construction in the sense of the statute where words have either a defined meaning or can be shown by the statute to be used in a special sense—does not lead to the conclusion desired by the appellants. It in fact leads to an impasse, rendering interpretation necessary to preserve the sub-section from futility. The second answer is that so far at least as the sub-section deals with inalienable estates tail, as distinct from estates for life, even a literal construction in the appellants' sense will not exclude aggregation.

Now, the sub-section is divided into two parts or limbs. The first, omitting words for the moment immaterial, I again set forth for convenience of reference: "Where any lands or chattels are so settled . . . . that no one of the persons successively in possession thereof is capable of alienating the same . . . . the provisions of this Act with respect to settled property shall not apply." The literal construction of these

(1) L.R. 4 H. L. 100, 123.

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words is that they make inapplicable to the lands and chattels so settled every provision of the Act with reference to settled property. The lands and chattels are no longer charged as such. And Mr. Tomlin so far agrees. But he says they remain charged under s. 1 of the Act as unsettled property. I cannot so read the words. They do not import any suggestion that the lands and chattels have ceased to be what in the forefront of the section they are stated to be—namely, "settled." The first result of the literal construction is therefore not that contended for. Its result, as I think, is that if the lands and chattels, as the sub-section on this construction says, are not to be charged as settled property, then, being, as they still are on the same construction, settled property, they stand uncharged by the Act, for the sub-section itself imposes no charge upon anything. The charge is imposed by s. 1. I need hardly say that this result, favourable as it would be to them, is not contended for by the appellants. It is too extravagant. It is none the less the result of the literal construction to which they appeal.

I come now to the second limb of the sub-section. How does the so-called literal construction fare here? The words are: "and the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued, for the purpose of Estate duty, in like manner as for the purpose of Succession duty." Now the appellants say the literal construction of these words is first that the Legislature has made the "taxable subject" the interest of the successor of the deceased in the lands and chattels, having first affirmed of that interest that it is "property passing on the death of a person in possession of the lands and chattels." The observation I make upon this is first that it involves a meaning being attached to the word "property" which it does not bear in this Act, and secondly that certainly in all cases where the tenancy in question is a tenancy for life it further imputes to the Legislature a statement for which there is no justification. And first, the "interest of a successor" is not

" property " within the meaning of the Act. In my view, as I have already said, the effect of the first limb of the section is still to treat what is being dealt with in the sub-section as settled property. Is then such an interest " settled property " ? Clearly not. It is not " property comprised in a settlement," the defined meaning of these words. But is it " unsettled property," as Mr. Tomlin says it should be regarded ? Almost equally clearly not. It is true that the definition in the Act of " property " is not like that of " settled property," an exhaustive definition. The expression " property " only *includes* the tangible things set forth in the definition from all of which this interest is far removed. But can such an interest in this Act be regarded as property apart from definition ? On Lord Macnaghten's statement of the Act, I think clearly not. But secondly, is it true to say, as the literal construction requires the Legislature to assert, that this interest of the successor is an interest " passing on the death of his predecessor " ? Again, confining myself for the moment to tenancies for life, I think clearly not. The interest of his successor does not on any view of the words " pass on the death of any person in possession of the lands and chattels." It does not pass ; it comes into possession. That is all. Under s. 1 of the Act it does not " pass " ; nor does it pass as being one of the things deemed to pass under s. 2. The assertion that this interest " passes " on the death is, therefore, not true in the statutory or dictionary sense. In any other permissible sense of the word the assertion is equally unfounded.

The result therefore of the so-called literal construction applied to the sub-section is that it begins by exempting the property from the burden of the tax altogether, and ends, certainly in relation to tenancies for life, by describing its new " taxable subject " or by justifying its selection as such by describing it in terms which have no foundation in fact. But the difficulties in the way of the so-called literal interpretation of the sub-section do not end here. Assume that the lands and chattels are not on this construction exempted from the charge under the first limb of the sub-section, then

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under the second limb the charge is to attach on the death of any person in possession of the lands and chattels. Of two things, one. Either the lands and chattels do in contemplation of the sub-section being "so settled" continue to pass to his successor on the death of a person in possession or they do not. If they do, they must be taken in this one case to be, by virtue of this sub-section, exempted from the charge upon them imposed by s. 1, although that charge is in terms unqualified. If they do not, how can the successor within the meaning of the sub-section ever be in possession of the lands and chattels, so that on his death the interest in turn of his successor may be charged with the duty? In other words, the sub-section will not operate on this view after the first death unless in some way or other the lands and chattels do continue to pass from predecessor to successor. But, as I have shown, they so pass. They pass under a statutory or royal title, and it being obviously in contemplation of the sub-section that every successive holder may at his death be in possession of the lands and chattels, the passing on his death of the lands and chattels from one holder to another is a necessary implication of the sub-section, so that the phrase that the property passing on his death shall be the interest of the successor is either unmeaning, or it is incomplete, and it requires interpretation to make it intelligible or sufficient. That the lands or chattels do in contemplation of the Legislature actually pass from one holder on his death to his successor is indeed very strikingly shown by s. 44 of the Finance Act, 1922. That section, as it seems to me, received less attention at the hearing than it deserves. It reads as follows: "Where any land or chattels settled by Act of Parliament or Royal Grant pass on the death of any person, any estate duty payable in respect thereof, or of any interest therein, under sub-s. 5 of s. 5 of the Finance Act, 1894, may, at the option of the person authorised or required to pay the same, and notwithstanding anything in the said section or in the Act of Parliament or Royal Grant settling the said land or chattels, be treated as a charge on and be raised and paid out of the

corpus of such land or chattels, and the provisions of s. 9 of the Finance Act, 1894, dealing with the charge of estate duty and the facilities for raising that duty shall apply." In this section the Legislature actually describes the land and chattels referred to in the sub-section as lands or chattels that pass on death. It only gives relief in that case—a conclusion which, while supporting the view of the sub-section which I am about to state, suggests that the acceptance of the appellants' view of it might be for them in the nature of a Pyrrhic victory.

I am accordingly led to the conclusion that this so-called literal construction is not in the present case permissible with reference either to the first limb of the sub-section or to the second. But while, as I have endeavoured to show, such a construction would not, for the reasons I have given, help the appellants to their declaration, even if it were accepted, there are other considerations now to be mentioned which also stand in their way.

The appellants can derive no benefit from these appeals unless they can establish under s. 4 that, on the proper construction of s. 5, sub-s. 5, the property here passing in respect of which estate duty is leviable is property in which the deceased never had an interest. Even if the only interest in the Eridge Estate in respect of which this duty was leviable on the death of the late Marquess was the estate of the present Marquess in that property, is it really correct to say, as the appellants must say, that that estate of the present Marquess was property in which the deceased never had an interest within the meaning of the proviso to s. 4? The estate of the present Marquess in the Eridge Estate is an inalienable estate tail. Such also was the estate of the late Marquess. So far, in discussing s. 5, sub-s. 5, on this point, I have confined my criticism to cases in which the inalienable estates taken in succession were estates for life. It is impossible to say, even if such an estate be property, that a successor's life estate "passes" to him on the death of his predecessor. But there is a very pregnant sense in which such a statement is correct enough where the estate in question is an unbarrable

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estate in tail. In *Earl of Zetland* v. *Lord Advocate* (1) Lord Selborne thus describes such an estate : " It is the same estate in law which was in the preceding owner ; which was not the less a beneficial fee, though the law placed fetters upon it so far as the power of alienation was concerned."

If this estate which passed to the present Marquess was the same estate as that which was in the late Marquess, how can it truly be said that in it the late Marquess never had an interest ?

While, however, these views of the case, if well founded, would suffice to dispose of these appeals, I prefer to rest my decision that the appeals cannot succeed on more than mere negative criticism and on a ground which would never be dependent on the accident that the estates in question were unbarrable entails, and were not merely inalienable estates for life. I prefer to rest my decision on the view which I hold, that not only is the so-called literal construction of no use to the appellants, but that it is not permissible at all with reference either to the first limb of the sub-section or to the second.

Conceding the fullest legitimate effect to the principle laid down in *Partington* v. *Attorney-General* (2) interpretation of both sub-sections is I think essential if an impasse is to be avoided and if there is not to be imputed to the Legislature self-contradictory statements.

As to the first limb of the sub-section the necessary emendation is I think easily enough arrived at. I agree fully in the view that the words there, " the provisions of this Act with respect to settled property shall not apply," really mean the provisions of this section which is described in the sidenote as dealing with " settled property." Indeed towards the close of his argument Mr. Ashworth James for one of the appellants was almost driven to accept this interpretation of the expression in order to avoid the greater difficulties presented by the other conclusion, to which however Mr. Tomlin, feeling doubtless the danger in this case of making any concession on such a point, adhered to the last.

(1) 3 App. Cas. 505, 519. (2) L. R. 4 H. L. 100, 123.

And for the reasons I have attempted to give I think that a so-called literal construction of the second limb of the sub-section is no more possible than a literal construction of the first. If only for the reason that it necessarily denies to and deprives of their proper statutory signification the words " property passing on death " interpretation is necessary. And the direction in which that interpretation must go is, I think, clearly pointed at, if reference be made to the governing s. 1 of the Act, and the words " principal value " as there used, and if it be also borne in mind that this sub-section is part of s. 5 the place and purpose of which in the scheme of the statute I have already alluded to. In my view all these considerations in combination irresistibly establish that in the cases covered by this sub-section, as in all other like cases under the Act, the property which passes on death is " the lands and chattels " themselves, and that the purpose of the sub-section and its sole purpose is in these special settlements to fix " the principal value " of the lands and chattels so passing according to a measure which would not be applicable but for the sub-section. The principal value of these lands and chattels is to be the value of the interest of the successor in them ascertained as provided by the sub-section. The circumstances are so compelling that it is, in my judgment, no more than necessary implication to read the sub-section as if the words " the principal value of " or their equivalent were treated as inserted immediately before the words " the property passing," or as if the words " in principal value " or their equivalent were inserted immediately before the words " be the interest." In the first alternative the words of the sub-section would be treated as the equivalent of " (the principal value of) the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor " ; and in the second as the equivalent of " The property passing on the death of any person in possession of the lands and chattels shall (in principal value) be the interest of the successor," etc.

It seems to me that either implication is less than the

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emendation necessary to make the first limb of the section work at all, while either of them has the effect within the terminology of the Act of giving effect to its agreed result: of making the sub-section correspond with the view of it taken by s. 44 of the Act of 1922, producing incidentally a result in entire harmony as applied to this specially settled property with the analogous provisions with reference to settled property generally of the earlier sub-sections of the section.

Nor is the emendation much greater than that which the appellants, in addition to all their other difficulties, have themselves to make in order to bring the sub-section into relation with the proviso to s. 4. Not only have they for this purpose to say that this interest of the successor is property which passes on the death, but, although the sub-section in no way says so in terms, they must say that the words "and such interest shall be valued for the purpose of Estate duty in like manner as for the purpose of succession duty" are inserted as a special method of reaching "the principal value" of that "property." How hard it is to bring this indeterminate expression into line with the emphatic words of the proviso: "Provided that any property so passing in which the deceased never had an interest . . . . shall not be aggregated with any other property but shall be an estate by itself, and the Estate duty shall be levied at the proper graduated rate on the principal value thereof." I have indeed the greatest possible difficulty in seeing how on any fair construction of the sub-section, any connection between it and the proviso to s. 4 can be established at all, a difficulty not lessened by the conviction that any connection between the two was entirely beyond the conception of the draftsman of the two sections or either of them.

A word only upon *In re Bolton Estates Act*, 1863. (1) The really important decision in that case for present purposes is now superseded by s. 44 of the Finance Act, 1922, already cited. I need not here discuss the question whether that decision was right or wrong. Much might be said about it. The point as to aggregation however never arose in the case,

(1) [1904] 2 Ch. 289.

and was far from the mind of one at least of those who were engaged in it. I can give no offence to any one but myself if I say that in relation to that question the Court was not given any assistance, and I cannot suppose that the learned judge was even remotely dealing with it. On the whole accordingly, although not possibly on quite the same grounds, I have reached the conclusion that the decision of Sankey J. in this case was correct. With my Lord I am for dismissing these appeals from that decision.

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Appeals dismissed.

Solicitors for appellants: *Williams & James.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

W. I. C.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1922 *Oct.* 19, 20, 23, 24.

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Riot—Soldiers—Damage to Shop in Military Camp—Compensation out of Police Rate of District—Liability of Police Authority—Riot (Damages) Act, 1886 (49 & 50 *Vict. c.* 38), *s.* 2.

Acts which constitute a riot when committed by civilians equally constitute a riot when committed by soldiers, notwithstanding that the acts take place in a military camp.

By s. 2, sub-s. 1, of the Riot (Damages) Act, 1886, where a house, shop or building in any police district has been injured or destroyed, or the property therein has been injured, stolen or destroyed in a riot, the persons who have suffered loss are entitled to compensation out of the police rate of the district:—

Held, that the fact that the rioters are soldiers and that the property which has been injured or destroyed in a riot is situated in a military camp and in a private place does not disentitle the persons who have sustained loss thereby from claiming compensation out of the police rate of the district.

Decision of Swift J. affirmed.

ACTION tried before Swift J.

In 1914 or the early part of 1915 the military authorities, acting under powers conferred by the Defence of the Realm

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(Consolidation) Regulations, 1914, and the Military Lands Acts, 1892 to 1903, took possession of Witley Common, which lies on either side of the main road from London to Portsmouth, and established a military camp for the accommodation and training of newly enlisted soldiers. The Secretary of State for War, on January 27, 1915, made certain by-laws for the regulation of Witley Common. Under those by-laws the military authorities had the right to arrest any person going on to the camp without permission in order to be dealt with according to law. No. 15 of the by-laws provided that: "The following persons, viz., ... or (5.) Any constable; shall have power and are hereby authorised (1.) to remove from the said lands and take into custody without warrant, and bring before a court of summary jurisdiction as provided by the Military Lands Acts, 1892 to 1903, to be dealt with according to law, any person contravening any of these by-laws." The military authorities, however, did not interfere with the main Portsmouth road which ran through the camp except to put up notices that motor vehicles should not be driven at a speed exceeding twelve miles per hour. At either end of the camp sentries were posted on the road who sometimes stopped and questioned persons proceeding along the road.

In July, 1915, the plaintiff and other persons obtained permission from the military authorities to encroach on the land in the possession of the War Department at Witley Camp and to erect shops or stores. These shops or stores were erected along the Portsmouth road, but inside the lines of the camp. The plaintiff agreed to pay 30*l.* a year together with rates and taxes for permission to erect a building to be used for the business of a tailor and hosier until she received a fortnight's notice to remove her encroachment.

Before the camp was established Witley Common was under the protection of the Surrey police, who patrolled the Portsmouth road, and after the camp was established the Surrey police continued to perform their duties as before. When a burglary was committed at one of the shops situated

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on the Portsmouth road within the camp the burglar was arrested by a policeman and taken to the police station. When the occupier of one of the shops exposed a light contrary to the Defence of the Realm Regulations the offender was prosecuted by the police and fined.

From November, 1918, to June, 1919, the camp was occupied by a large number of Canadian soldiers who were waiting to be sent home to Canada. On the night of February 9 and the morning of February 10, 1919, the plaintiff's shop and other shops in the camp were damaged and the contents stolen by a number of Canadian soldiers who had previously released some fellow-soldiers in custody and had raided the officers' mess.

The plaintiff alleged that the soldiers were guilty of a riot, and she claimed compensation from the defendants under the Riot (Damages) Act, 1886 (1), for the damage she had sustained.

The defence was that the defendants were not liable for the damage, because the plaintiff's shop was not in the police district administered by them, being in Witley Camp, an area which was under military control and not under the control of the Surrey police. Further, that the plaintiff's property had not been destroyed by persons riotously and tumultuously assembled together, because the damage had been caused solely by soldiers.

J. G. Hurst K.C. and *J. B. Melville* for the plaintiff.
Schiller K.C. and *Sir Richard Muir* for the defendants.

SWIFT J. The question for decision in this case is whether the defendants as the administrators of the police fund for

(1) Riot (Damages) Act, 1886, s. 2, sub-s. 1: "Where a house, shop, or building in any police district has been injured or destroyed, or the property therein has been injured, stolen or destroyed, by any persons riotously and tumultuously assembled together, such compensation as hereinafter mentioned shall be paid out of the police rate of such district to any person who has sustained loss by such injury, stealing, or destruction; but in fixing the amount of such compensation regard shall be had to the conduct of the said person, whether as respects the precautions taken by him . . . . or as regards any provocation offered to the persons assembled or otherwise."

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the district are liable to pay to the plaintiff the sum of 550*l.*, which sum I fix to be the pecuniary loss which she sustained. That question depends entirely upon the Riot (Damages) Act, 1886, s. 2, sub-s. 1. [His Lordship read the section and continued:] The plaintiff says that a house, shop or building in a police district—namely, in the district of the Surrey police—has been injured or destroyed and the property therein has been injured, stolen or destroyed by persons riotously or tumultuously assembled together, and that therefore she is entitled to compensation. The defendants contend that although it is true that a house, shop or building has been destroyed it is not a house, shop or building in any police district, as the police had no jurisdiction over Witley Camp, the action of the military having taken Witley Camp completely out of the police district. The defendants also contended that the property had not been injured, stolen or destroyed or the building injured or destroyed by any persons riotously and tumultuously assembled together, for if the injury was done to the property, as indeed it is admitted it was done, by the company which assembled on the night of February 9 and the morning of February 10, it was done by soldiers in a military camp, and it was said that soldiers in a military camp are not persons who can riotously and tumultuously assemble together. In other words the defendants contend that the Act of Parliament, which gives compensation to a person whose property is damaged in a riot, does not apply if the injury to property is done by soldiers in a camp and is done to property situated in that camp. Mr. Schiller for the defendants contended first that soldiers cannot riot, and, secondly, that if they are acting in a camp it has been taken by the military authorities outside of the police district. I am much indebted to Mr. Schiller for the very clear way in which he put his argument with regard to this matter before me, but I do not accept it. I do not see any reason why by the laws of this country if three or more soldiers join together they should not be just as guilty of a riot as any three civilians. In order to constitute a riot by the laws of this country there must be present five

elements: first, the assembly of a number of persons not less than three in number—here the evidence is clear that on the night of the 9th and on the morning of the 10th there was an assembly of something like 100 persons at the start, but afterwards of a much greater number of persons; secondly, they must have a common purpose. It is quite clear from the way in which this commotion started that those who were taking part in it in going first of all to the guard room to liberate their colleagues who had been arrested and who alleged that they had been badly treated, and then going to the officers' mess and the sergeants' mess and breaking into the liquor stores there, and then going on to the shops in Tin Town and breaking into them and looting the contents, were acting with a common purpose; thirdly, they must act also in execution or inception of the common purpose; fourthly, there must be an intent on the part of the persons assembled together to help one another, by force if necessary, against any person who may oppose them in the execution of the common purpose; and lastly, there must be force or violence not merely used in and about the common purpose, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage. I am quite satisfied that there was a considerable amount of force and violence used by these soldiers for the object of attaining their common purpose, that by their conduct they showed themselves prepared to assist and defend each other and to help one another by force if necessary against anybody who might oppose them in the execution of that purpose, and they certainly used force and violence which, in my view, was far more than sufficient to alarm at least one person of reasonable firmness and courage. I have only to look at the evidence of the police sergeant and of the two constables who were called to be satisfied that an amount of force and violence was used which might very well intimidate or frighten reasonable people. I think therefore that there were here all the elements necessary to constitute a riot.

It is however said that although this commotion might have been a riot if the participants in it had been civilians,

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nevertheless it cannot in the present case amount to a riot because the participants in it were soldiers and soldiers in a camp cannot be guilty of a riot. I fail to follow that argument. It may be that the soldiers who participated in it were guilty of mutiny and that they were properly dealt with by the military authorities for a mutiny, but it does not follow because an act or a series of acts may amount to a mutiny that they may not also amount to a riot. If that which is done by an ordinary civilian in common with two or more other civilians is a riot, it seems to me to be equally a riot when it is done by three or more soldiers. If a thing done by an ordinary citizen is an offence against the law it is equally an offence against the law if it is done by a soldier. The position of a soldier carries with it duties and gives some rights and privileges which civilians do not possess, but there is nothing in the status of a soldier which relieves him from the ordinary law relating to an ordinary citizen. The law has been laid down to that effect as I understand it over and over again. Lord Mansfield C.J. in *Burdett* v. *Abbot* (1) said that "a soldier is gifted with all the rights of other citizens, and is bound to all the duties of other citizens, and he is as much bound to prevent a breach of the peace, or a felony, as any other citizen." If he is bound to all the duties of other citizens, and he disregards those duties, he commits a crime just as any other citizen. It is true that counsel in this case have not cited any case in which there has been a riot on the part of soldiers before the present one (2); but although the occasion for considering the matter may never have arisen before, it seems to me to be perfectly clear that when soldiers do the acts which when done by ordinary persons would amount to a riot, they are not relieved from the consequences because those who do them are soldiers.

It is said however that not only were these soldiers incapable of committing a riot, inasmuch as the law does not contemplate the possibility of soldiers committing a riot, but further that

(1) (1812) 4 Taunt. 401, 449.

(2) See, however, *Tyler & Sons* v. *Cork County Council* [1921] 2 I. R. 8.

the place which the soldiers were in prevents what they did from being a riot, because they were in a military camp, and that therefore the plaintiff's shop was not in a police district at all—it had been taken out of the police district by the fact that the military authorities had taken Witley Common for the camp, the shop was on the common, and therefore it was not in a police district and the police were excluded from it. I have been much impressed by the argument of Mr. Melville in answer to that contention. Mr. Melville points out that whatever the military authorities did could not amount to more than to make the place where they had their camp more and more of a private place by excluding the public and even the police. Mr. Melville says that one may even take an extreme case and suppose that the military authorities had made the camp an absolutely private place into which no one had any right to go. But even then there is nothing to prevent a riot taking place in a private place. There is nothing which says that the damage done by rioters in order to be recoverable under the Riot (Damages) Act must be damage which is done to property in a public place. *Gunter* v. *Receiver for the Metropolitan Police District* (1) is an authority to the effect that the fact that the rioting takes place in a private place is no answer to a claim under the statute. Mathew J., considering the statute in the year 1888 soon after it had come into force in a case which is said in the report to be the first case tried under the Act, said : "The Solicitor-General had contended that the words in the Act 'persons riotously and tumultuously assembled together,' meant in a public place. He saw no reason why such a limitation should be put on those words." If Mathew J. did not see any reason why that limitation should be put on the words in 1888 I am sure I do not see any reason why that limitation should be put upon them in 1922, and therefore the fact that this camp was a private place does not, in my opinion, prevent it being a place in which a riot could take place and in which damage by riot might take place. But it is said that the police had no control over the soldiers

(1) (1888) 5 Times L. R. 58.

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and that they were helpless to do anything. I do not think that that contention is right. I think that the police had the right of control directly a felony was committed in their presence. Of course they had not the power of exercising control. I have stated what opinion I have formed of the three police officers who gave evidence before me. I have not the slightest doubt that they had sufficient courage to try to stop the disturbance; they would, however, have been foolish men had they attempted to do so, as it could not possibly have done any good and they might have been very seriously hurt if not actually killed in endeavouring to quell the disturbance, but the fact that it may not be physically possible for the police to quell a disturbance does not affect the question of their legal rights. I am far from being satisfied that if the police in the neighbourhood of a military camp see the soldiers breaking it up they have not a legal right to apprehend them for the breach of the peace or for the felony which they are committing.

For these reasons I have come to the conclusion that there was on the night of February 9 and the morning of February 10 a riot in the neighbourhood of the plaintiff's store in the Witley Camp on the Portsmouth road. I think that in the course of that riot her goods and her building were damaged to the extent of 550*l.* and I think that she is entitled to have compensation from the local police authority for it. The right to compensation does not seem to me to be in the least degree dependent upon any action or inaction on the part of the police. It is quite clear that it would have been physically impossible for all the police in Surrey, who I think numbered 280 at this time, to have taken control of that camp without the assistance and support of the military authorities. It would have been a physical impossibility for them to have reduced some hundreds of rioters, many of whom I suppose were armed or had access to arms, to such a state that they could say that the riot was quelled. But no one here suggests any neglect or impropriety on the part of the police. Every one who has heard this case I should think has come to the conclusion that they acted with great discretion and great

propriety in the matter. But the Act of Parliament does not give a citizen a right to compensation for damage by riot on any principle of blaming the police over the matter. The fact that the damage has been done in spite of the care and protection of the police or because of the negligence of the police does not affect the right of the claimant to have compensation. It is a right which is given to the individual who is hurt by a riot to have his damages shared by the whole of the community, and the community for the purpose of this sharing is the police district within which the building injured or destroyed is situated. The plaintiff is entitled to have the wrong which was done to her shared by all the contributors to the police fund in the police district of Surrey.

It is however contended that if this were a riot and the soldiers could be guilty of riot, and that making a commotion in a camp like this could be a riot, still the plaintiff brought at any rate some, if not all, of the damage upon herself by provoking the soldiers by charging excessive prices. I have heard the evidence on both sides with regard to this matter and I find as a fact that the soldiers were not provoked by any excessive charges; that no charges which had been made in the camp by anybody had the least effect in causing the disturbances on February 9 and 10. I think they were caused, as I think the Canadian authorities say they were caused, by the disappointment of the men in not getting away as soon as they thought they were entitled to do, and I find as a fact that on the part of the plaintiff there was no provocation at all. I do not think that I should be justified on the evidence in holding that it was proved that any of the shopkeepers in Tin Town had been guilty of provocative conduct, but I certainly am not satisfied that the plaintiff was guilty of any such conduct.

Another point is made against the plaintiff that she left her shop without protection and left her goods in the shop without protection. She could not however take the goods back again to Godalming every night when the shop was shut up, and it does not seem to me that it would have made the least

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difference if one person or more than one had been left in the shop at the time the soldiers came. They were out to do mischief, they had been deprived of the sense of doing right by what they had looted at the officers' mess and the sergeants' mess, and they went direct from doing those acts to Tin Town. I do not think it can be said that because the plaintiff was not in her shop at the time taking care of her goods that she has brought about her own damage or contributed to her own damage by that lack of protection and defence.

In the course of this case there have been many matters discussed which I have not thought it necessary to say anything about in the course of my judgment. I have said enough to show the trend of my mind in the conclusions at which I have arrived. As I have said I have come to the conclusion that the plaintiff's damage was caused by the riot and that the police fund must pay for it. There will be judgment for her for the sum of 550*l.*

Judgment for plaintiff.

R. F. S.

The defendants appealed. The appeal was heard on February 27, 1923.

Upjohn K.C. and *Sir Richard Muir* for the appellants. The military authorities and not the police are responsible for the keeping of order in a military camp. The whole of this camp was outside the police district for the purposes of this Act, and if that be so the damage caused by the rioters in this case was not done within any police district within the meaning of this Act.

[LORD STERNDALE M.R. Under what law is it withdrawn from the police jurisdiction ?]

Reg. 4 and perhaps reg. 29 of the Defence of the Realm Regulations. Where there is control by the military authority that place is taken out of the police district: see s. 9 and Sch. I. to the Act. There cannot be conflicting police authorities.

The liability of the district to make compensation is based upon obligation or breach of duty: see Bracton, Lib. iii., cap. 10, fo. 124, Statute of Winchester, 1285 (13 Edw. 1, Stat. II., cc. 1 and 2).

On the evidence the result of what was done in this case was to constitute the area of the camp for all purposes of police jurisdiction entirely outside the county of Surrey.

Again, where soldiers are assembled in a camp and a tumult there arises, that does not constitute a riot. The soldiers taking part in the disturbance are not "persons riotously and tumultuously assembled together" within s. 2, sub-s. 1, of the Act. The elements of a riot are laid down in *Field* v. *Receiver of Metropolitan Police.* (1) There is no authority in which soldiers have been held rioters. It is submitted that soldiers in a camp cannot be rioters. Riot applies to civil commotions and not to combined acts of military insubordination, which may possibly amount to mutiny. If the defendants are held liable to pay compensation in this case extraordinary results may ensue. Riots may occur among soldiers marching from one district to another and damage may be done by them. To place liability for compensation upon the inhabitants of a district through which the soldiers happen to be passing would be manifestly unjust. In the case of riots by civilians the police are in a position to get warning of probable tumult and are able to provide against possible damage. The Legislature did not contemplate the control by police of large bodies of men under military discipline.

Thirdly it is submitted that under s. 2, sub-s. 1, the plaintiff's conduct is to be regarded. She voluntarily submitted her property to dangerous conditions. It was a speculation on her part to run the risk of damage at the hands of the soldiers. The county ought not to be fixed with liability to compensate her: *Gunter* v. *Receiver for Metropolitan Police District.* (2)

J. G. Hurst K.C. and *J. B. Melville* for the respondent were not called upon to argue.

(1) [1907] 2 K. B. 853. (2) 5 Times L. R. 58.

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LORD STERNDALE M.R. I do not think there are any grounds for this appeal. The only question before us is whether the plaintiff is entitled to compensation under the provisions of the Riot (Damages) Act, 1886.

The matter arises out of a disturbance—I use a neutral term—which took place in the camp at Witley where some Canadian troops were at that time stationed for the purpose of demobilisation. There had been a disturbance on Armistice Day, there were a good many disturbances, which as a rule were not very serious, and arose more out of exuberance of spirits than anything else; but there were some, and damage was done. This disturbance, which took place in February after Armistice Day, began by the soldiers rescuing some men who had been arrested and confined by the military police. After that, it proceeded to a disturbance in which the officers' quarters were wrecked, the canteen was looted and a considerable portion of the drink was stolen, and then an attack was made upon certain shops belonging to the plaintiff and others. Does that come within the words of the Act of 1886? The Act recites: "Whereas by law the inhabitants of the hundred or other area in which property is damaged by persons riotously and tumultuously assembled together are liable in certain cases to pay compensation for such damage, and it is expedient to make other provision respecting such compensation and the mode of recovering the same: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows." Sect. 2 enacts: [His Lordship read the section and continued:] Then "police district" is defined in Sch. I. to the Act: "Any county, riding, parts, division, or liberty of a county maintaining a separate police force." Therefore prima facie the whole of the county of Surrey, which contains its own police force, is within the police district, but the locus in quo of this disturbance is said not to be within the police district, and in order to deal with that argument, it is necessary to consider what this locus is. It is the camp on Witley Common, which is on each

side of the main Portsmouth road, not very far from Godalming, between Godalming and Hindhead. Through that camp runs the main Portsmouth road. There is also a public road from Haslemere to Guildford and other public roads which cross the common and the site of the camp. The site of the camp was taken by the military authorities under reg. 4 of the Defence of the Realm (Consolidation) Regulations, 1914, and the Military Lands Acts, 1892 to 1903. The sidenote to the regulation is: "Power to use land for training," and the regulation gives power to the competent naval or military authority by Order to authorize the use of certain land for the purpose of training His Majesty's naval or military forces and to provide a temporary suspension of footpaths or things of that kind and to prevent access to persons whom the military authorities do not wish to be in the camp. We were also referred to reg. 29, which in my opinion is not material to this case. It merely gives a power to prohibit anybody from approaching a camp or military work nearer than seems good to the military authority, and by reg. 29b the same power preventing access to certain places is given in the case of what is called a special military area, although it is not a camp. This camp had been originally a training camp, but at the time of this matter arising it was a demobilisation camp. The first thing that is clear is that geographically this camp is within the police district, but it is said that although geographically within this district, it is taken out of it for the purposes of this Act. It is first said to be taken out of it absolutely, but if not absolutely it is taken out of it for the purposes of this Act. There is no statute or regulation that takes it out. The regulations I have read do not take it out of the police district at all; they do not interfere with the rights that existed at the time when those regulations were made, except so far as was necessary for military purposes. But although counsel can point to no statute or regulation which takes this area out of the police district, and although it is the fact that the civilian police did exercise jurisdiction within it because they patrol the Portsmouth road, and on one occasion a civilian sergeant arrested

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a man for burglary, and on another occasion a civilian sergeant took steps with regard to the exposure of lights in the shops, and also lights in the camp actually in charge of the military authorities—although that is so, it is said that this camp under the circumstances ceased to be within the police district. The circumstances are that this camp was inhabited by soldiers who were under military discipline and controlled by military police. It was more convenient and very much wiser that soldiers, especially Dominion soldiers, should be controlled by their own police than by the civilian police of the district. Soldiers always have an objection to being interfered with by civilians, and it is very much wiser not to employ civilian police in dealing with soldiers in a military camp. But that is a long way from saying that the camp and the soldiers are taken out of the jurisdiction, if I may call it so, of the civilian police, and that the civilian police are in law deprived of the rights they would otherwise have within that part of the police district. There is no foundation, in my opinion, for saying anything of the sort. For convenience the officers wisely employed pickets and military police to look after the soldiers, and for convenience the civilian police do not interfere, as a rule, but they still maintain their rights in that part of the police district just the same as they do in other parts of it. There may be difficulties in their way in exercising those rights because of the necessarily superior forces possessed by the military powers in time of war; but that does not affect their legal position in the least. Therefore it seems to me quite clear that this camp was within the police district, and the first requisite to bring the matter within the Act is satisfied. "A house, shop or building in any police district has been injured or destroyed and property injured, stolen or destroyed." Has it been so injured or destroyed by persons riotously or tumultuously assembled together? It seems to me only necessary to state the question to answer it. Counsel for the appellants put a case that might possibly raise some difficulty—namely, where soldiers are on the march from one point to another and in passing through

some town they create a riot. What a gross injustice it would, he said, be if the inhabitants of that police district had to pay. That case can be dealt with when it arises. It is not this case. These soldiers were not marching under military discipline; they collected from various parts of the camp, not under military discipline at all, but breaking military discipline in order that they might assemble tumultuously and riotously, and they did it. After releasing some of their comrades who were in confinement, they looted the officers' quarters; they broke into the canteen and stole the drink, and then attacked the civilians' houses and destroyed them to a great extent, at any rate they broke into them and stole the goods. The learned judge has stated the requisites that exist in order to constitute a riot, and I agree with him. He has held that all those requisites are satisfied in this case, and again I agree with him. I cannot understand the argument that because there may have been a mutiny therefore it was not a riot. The two words "mutiny" and "riot" do not seem to me to be mutually exclusive. I do not say that all mutiny is riot, and I do not say that all riot is mutiny, but it is impossible to say that mutiny can never be riot, and, unless the argument be put as high as that, it does not help the defendants. I believe some of the rioters were dealt with as mutineers. It does not make them any the less persons riotously and tumultuously assembling together within the meaning of the Act. That really disposes of the whole case, except that it is said that the plaintiff brought this upon herself and that her conduct, whether as regards precautions taken by her or otherwise, disentitles her to receive compensation. Before the learned judge that seems to have been based in great measure upon her not having left somebody in charge of the house, and not having removed her goods from the house or shop in the evening when she went away. That has not been pressed before us, and, obviously, if there had been anybody there, it would not have made any difference, and, equally obviously, it would have been unreasonable to have required that the goods should be carried to and from the

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shop every morning and every evening. But in this Court it has been put on much broader grounds. It is said that her conduct in opening her shop in the camp and staying there after the riot on Armistice Day and after there had been threats to the shopkeepers disentitles her to receive compensation. I do not think that is so. I can see nothing in her conduct in going there and opening a shop for the purposes of dealing with the soldiers in the camp that disentitles her to recover compensation or constitutes such conduct as to prevent her receiving compensation when her property is destroyed. There was evidence that the shops were a great convenience to the men in camp, and that when the shopkeepers asked the chief constable to have some further protection, he referred the matter to the military authorities; but so far as I can see, he never gave the applicants any warning that the camp was a dangerous place and that they had better go. It seems to me it is impossible to say that the plaintiff's conduct in any way disentitled her to receive compensation under the Act, and, therefore, I think the appeal should be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The first contention raised by the appellants was that the plaintiff's shop was not at the time it was injured or destroyed in a police district within the meaning of the Act. In a concrete form the question is whether at that time the area of Witley Camp was within the police district of the county of Surrey. It is quite clear that before the autumn of 1914, when the War Office determined to use the area of Witley Common for the purpose of a training camp, that area formed part of the police district of Surrey; of that there is no question. That being so, it seems to me that in order to support the contention which they have put forward, the appellants must demonstrate that by some means or other the area has by law been taken out of that police district. There is no statutory provision, whether by Act of Parliament, or by regulation or byelaw having the force of an Act of Parliament, which has that effect. Then it is said that the Act must be so construed, whether by rule of commonsense or otherwise, as to exclude

for the purposes of the Act from the expression "Police District" any district in which a body, not the ordinary civilian police, is by law charged with the maintenance of law and order, and is itself empowered to maintain a police force; and it is said that this area was such a district because the military authorities were charged with the maintenance of law and order, I suppose so far as those who were under their jurisdiction were concerned, and were empowered to maintain a police force. In my opinion that proposition is quite unsustainable; there is no authority for it, nor can I in reason see any ground for contending that, because the particular individuals who formed the military body were subject to military discipline, the area in which they lived should be withdrawn from the ordinary police protection of the rest of the county. That proposition therefore seems to me to fail. Then it is said that the persons by whom the shop was injured and the plaintiff's property was stolen, were not persons riotously and tumultuously assembled together. That they were in fact riotously and tumultuously assembled together, and that injury and loss was occasioned while they were so assembled, and by their riotous and tumultuous acts, there can be no question. But it is said that because they were soldiers and because their offence had the added gravity of being a mutiny, therefore they were not in civil law riotously and tumultuously assembled together. Really I fail to follow that. The Act of Parliament makes no exception at all—it provides simply that if injury is done by any persons riotously and tumultuously assembled together, then compensation is to be paid by the police authority in whose district that riot takes place. It may be true that hard cases may arise, but however those cases may be dealt with, I agree with the Master of the Rolls that they are not this case. This was the ordinary case of a riot, and the fact that the rioters happened to be under military discipline and guilty of mutiny as well as riot, does not seem to me to take the case out of the Act of Parliament.

With reference to the defence founded on the conduct of the plaintiff, I have nothing to add to what has been said

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by the Master of the Rolls, and in my opinion this appeal fails.

ATKIN L.J. I agree. This riot took place in an area which comprised Witley Common and which was taken possession of by the military authorities during the war under the Defence of the Realm Act, and the regulations made thereunder, and under powers given to military authorities by the Military Lands Acts. The area is part of the county of Surrey, but it is said that by virtue of the powers which the military authorities possess, having taken possession of it as I have mentioned, that area ceased to be part of the police district as defined under the Act and was taken out of it. That appears to me to be a complete misapprehension of the facts. The area of the camp was, and still is, within the police district, though it was exclusively occupied by soldiers, and there seems to me to be no reason at all for suggesting that the ordinary barracks in any county occupied by the forces of the Crown and owned by the Crown are not within the police district in which they are situated. No authority has been suggested for that proposition, and it cannot be contended that military barracks are an Alsatia. The law runs there. Everybody in the military barracks is subject to the criminal law and to the civil law, and the police authorities have the ordinary rights to enforce process there, subject to such limitations as may be imposed by the fact that the premises are premises of the Crown. I think that this area quite plainly was within the police district; in fact the authority of the military over it was less than that which would be conferred upon them if the property had been exclusively the property of the Crown. As it appears to me, the rights of the public over the common were only excluded so far as was made necessary by the regulations. I have no doubt at all that this district continued to be part of the police district. The only further question that arises is: Was this disturbance a riot? That it would have been a riot if committed by persons other than soldiers there can on the findings of the learned judge be no doubt. The only

question is whether it ceased to be a riot because it was committed by soldiers in an area which, as I have said, was occupied by the military authorities for the time as a military camp. I think there is no foundation for the suggestion that it is not a riot. It is to be remembered that every person subject to military law in this realm is still subject to the criminal law, and a criminal offence committed by a soldier would be just as much an offence against the criminal law as if it were committed by a civilian; and it is also to be remembered that by s. 41b of the Army Act a person subject to military law when within His Majesty's dominions may be tried by any competent civil Court for any offence with which he would be chargeable if he were not subject to military law. I think there can be no doubt whatever that these persons could be indicted in a criminal Court in this country for riot, and if they were convicted, they would have been liable to punishment. I think that as it was a riot and an offence against the criminal law, so in the same way under the Act it is such an assembly as is meant to be covered by the Act. The argument to the contrary consisted of a combination of two circumstances—namely, that they were both soldiers and acting within the area of the camp. It can hardly be doubted but that if they were soldiers, that is to say subject to military law, and this offence were committed outside the camp, it would be within the Act. I can see no reason why it should not be. The possibility of a disturbance by three or four soldiers, which is enough to constitute a riot, must have been well within the contemplation of the Legislature at the time they made this provision, and if in fact a riot took place within a camp or within barracks and damage is done, I see no reason why a person so damaged should not recover compensation. In an ordinary case if damage is done in barracks, the damage for the most part would be done to Crown property. I am far from saying that the Crown would not be entitled under those circumstances to recover compensation. Of course questions would arise which under the Act with regard to damage would make it difficult in some cases, at any rate, to

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recover compensation. For the above reasons it appears to me that the case is made out. Then it is suggested the compensation ought to be diminished or entirely withheld, regard being had to the conduct of the plaintiff, and when the complaint is investigated, it is said the conduct of the plaintiff which disentitles her to compensation is that she by a rash and hazardous speculation entrusted her property and her liberty to the control of the military authorities in Witley Camp. That, to my mind, is an absolutely preposterous proposition, and I venture to say that under ordinary circumstances if there is one place where a British subject is entitled to have reason to expect that his property and his liberty will be respected, it is where he or she is subject to the control of British soldiers.

Unfortunately, in this case, in the very special circumstances, the expectation was not fulfilled, and damage was done. But, as has been stated in argument, the very absence of any previous case such as this—charges of riot brought under similar circumstances—shows how well-founded the expectation of safety would ordinarily be. To my mind, it was a misuse of terms to suggest that there was anything unreasonable or rash or hazardous in the tradespeople in this case entrusting themselves in the vicinity of these soldiers. I think the learned judge was perfectly correct in the view he took of the case in that respect. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Wyatt & Co., for T. W. Weeding, Kingston-on-Thames.*

Solicitor for respondent: *W. E. Craigen.*

G. A. S.

[IN THE COURT OF APPEAL.]

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March 6.

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Revenue—Estate Duty—Property situate Out of the United Kingdom in Respect of which Legacy Duty would be payable but for the Relationship of the Person to whom it passes—Legacy Duty Act, 1796 (36 *Geo.* 3, *c.* 52), *s.* 12—*Succession Duty Act*, 1853 (16 *&* 17 *Vict. c.* 51), *s.* 18—*Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2, *sub-s.* 2.

By s. 1 of the Finance Act, 1894, estate duty is payable upon all property which passes on the death of a person. By s. 2, sub-s. 2, "property passing on the death of the deceased when situate out of the United Kingdom shall be included only, if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes."

Under the will of a testator, who died in 1890 domiciled in England, a sum of money was bequeathed to trustees to be invested for his daughter for life, and afterwards for such of her children as she should by deed or will appoint, and in default of appointment for her children in equal shares.

Legacy duty on the fund was paid by the executors. The testator's daughter, who died in 1919, by her will appointed the fund in favour of her children. The appointed fund consisted exclusively of stocks and bonds of American companies and corporations. The Crown claimed estate duty in respect thereof under s. 2, sub-s. 2, of the Finance Act, 1894, as being property which was deemed under that Act to have passed on the death of the testator's daughter:—

Held, that legacy duty was not payable. It was not so payable because, the persons entitled in succession being in the same degree of relationship to the original testator, by virtue of s. 12 of the Legacy Duty Act, 1796, the duty was payable at the same rate and had been paid once for all at the testator's death. It could not, therefore, be said that it "would have been payable but for the relationship of the person to whom the property passed." Under these circumstances estate duty was not payable on the fund.

Decision of Sankey J. [1922] 1 K. B. 491 reversed.

APPEAL from the decision of Sankey J. upon an information by the Attorney-General. (1) The facts stated in the information were shortly as follows: J. S. Morgan died on April 8, 1890, and by his will, dated November 23, 1889, and proved in the Principal Probate Registry on May 7, 1890, he left 600,000*l.* to trustees to be invested for his daughter, the late Mrs. Burns, for life, and afterwards for such of her children

(1) [1922] 1 K. B. 491.

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as she should by deed or will appoint, and in default of such appointment for her children in equal shares. The defendants were the present trustees, and it was admitted for the purposes of this case that the late J. S. Morgan was domiciled in England when he died. Legacy duty was paid on the sum in question by his executors.

Mrs. Burns died on July 20, 1919, and by her will dated December 2, 1908, and proved in the Principal Probate Registry on August 19, 1919, she exercised the power of appointment given to her under her father's will in favour of her children. The fund representing the sums of money above referred to consisted exclusively of stocks and bonds of American companies and corporations. The Attorney-General claimed a declaration that estate duty became payable on the death of Mrs. Burns in respect of the funds and investments representing her share or portion under J. S. Morgan's will, and that the defendants were accountable for such duty. He also claimed an order for all necessary accounts and inquiries.

Upon the trial of the information Sankey J. held that legacy duty would have been payable on the death of the testator's daughter but for the relationship of the persons to whom the property passed, and that therefore estate duty was payable under s. 2, sub-s. 2, of the Finance Act, 1894, on the death of Mrs. Burns in respect of the funds and investments representing her share under her father's will.

The defendants appealed.

Latter K.C. and *A. Andrewes-Utthwatt* for the appellants. Estate duty is not payable in this case. Under s. 2, sub-s. 2, of the Finance Act, 1894, estate duty on property passing on the death of the deceased when situate out of the United Kingdom is only payable if under the law in force before the passing of the Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes. Here no question of succession duty arises, because legacy duty was payable and paid on the death of J. S. Morgan: see s. 18 of the Succession Duty Act, 1853. Then legacy duty having been charged

and paid once for all on J. S. Morgan's death no further duty is payable on the death of Mrs. Burns. Sankey J. has held that legacy duty would have been payable but for the relationship of the persons to whom the property passed. It is submitted that the reason why legacy duty is not payable in this case is not because of any question of relationship, but because under s. 12 of the Legacy Duty Act, 1796, the rate of duty being the same in the case of all those successively entitled it was payable and paid once for all on the death of the original testator, and having been so paid legacy duty is not payable, and therefore, the property being out of the United Kingdom, estate duty is not payable in respect of it. The contrary construction advocated by the Crown leads to curious results. [These are indicated in the judgments of the Court (infra).]

Sir E. Pollock K.C. and *Sheldon* for the Crown. Legacy duty would have been payable in this case on the death of Mrs. Burns but for the relationship of the persons to whom the property passed. Therefore, although that property is situated out of the United Kingdom estate, duty is payable in respect of it under s. 2, sub-s. 2, of the Act of 1894.

LORD STERNDALE M.R. I cannot agree with the learned judge in his construction of this section. The question is whether estate duty is payable upon certain property passing upon the death of Mrs. Burns, who was tenant for life with a limited power of appointment amongst her children, and on her death in default of appointment the property would go to her children, so that there was nobody interested except persons in the direct line from the original testator, the daughter and her children. Under s. 12 of the Legacy Duty Act, 1796, they would all pay the same rate of duty and the duty was paid upon the death of the original testator, Mr. Morgan. The question is whether in these circumstances estate duty is now payable upon the death of Mrs. Burns. No doubt the property passed on her death. No question has been raised about that. But it was property which comes under s. 2, sub-s. 2, of the Finance Act, 1894, because

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it was situate out of the United Kingdom. That sub-section provides: "Property passing on the death of the deceased when situate out of the United Kingdom shall be included only, if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes." The question is whether legacy duty, which it is admitted would not be payable, is not payable because of the relationship of the person to whom the property passes. "Relationship" I presume means relationship to the person from whom it comes.

The argument for the Crown may be not unfairly put in this way. The primary reason why legacy duty is not payable here is because it has already been paid. It has been paid under the provisions of s. 12 of the Act of 1796, and the argument is to this effect: Legacy duty here would be payable if it had not already been paid. It has been paid because the rates of duty payable by all the persons who could be entitled in succession are the same. In this case the rates of duty are the same, because the relationship of all the persons in succession to the testator is the same. Therefore, say the respondents, it is not payable now because of the relationship of the persons to whom it passes. And I think they must go on to say: It does not matter that there are cases in which legacy duty would not be payable in circumstances like these, although the relationship which exists here did not exist. That seems to me to be rather a long train of causation, and I do not think it is sound, for this reason: When you look at s. 12 of the Act of 1796, I think it is fairly summarized by the learned judge with perhaps a criticism of the word "charged" that he uses, though I do not think he was using it in the technical sense of saying that the section was a charging section.

He says (1) "It is a long section, but it enacts how duty on legacies enjoyed by persons in succession or having partial interests therein shall be charged." I think he meant "shall be payable." He did not mean that that was the charging

(1) [1922] 1 K. B. 497.

section; he meant it provided how duty was to be paid. He used the word "charged" in a general sense.

Then he goes on: "Two cases are there contemplated: (1.) Where the duty payable by the different persons in succession is at one and the same rate. (2.) Where the duty payable by the different persons in succession is at different rates, or one or more of them is not liable to any duty. In the first of these cases the duty is payable as in the case of a legacy to one person, that is, once and for all; in the second case a different principle applies and different times are enacted for payment by the different persons."

When you come to look at the cases in which the rates are the same, there is, at any rate, one instance in which the rates would be the same, although no question of relationship enters into the matter at all, and that is a case where the first beneficiary and all the others in succession are persons of no degree of consanguinity to the testator at all. In that case legacy duty would be payable once and for all, exactly as it would be in the case where the similarity was brought about by relationship, and therefore if the learned judge is right, there would be this curious result, that persons who paid the 10 per cent. duty, as not being in any degree of consanguinity at all, would escape estate duty because the legacy duty would not be payable, not because of the relationship but because it had been paid, apart from the relationship altogether, whereas the persons who were in some degree of relationship would have to pay estate duty because the similarity happened in those cases to be brought about by the relationship between the parties.

I think, as I say, that the Crown's argument requires too long a train of causation. I think that the reason why legacy duty is not payable here is, not because of any relationship between the parties, but because it has already been paid, and it has already been paid because all the persons in succession would pay the same rate of duty and therefore would come under s. 12 of the Act of 1796; and the fact that that similarity is brought about in this case by the relationship between the parties does not seem to me to be enough to

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satisfy the words that "legacy duty would be so payable but for the relationship of the person to whom it passes." It so happens that the result is brought about in this case by the relationship, but there is a case—it is quite true there is only one—under the Legacy Duty Acts in which legacy duty would not be payable simply and solely owing to the relationship of the parties, and that is the case of husband and wife. And as there is a case which may be satisfied by these words, and as they have to be read with a very extended meaning, and in order to cover this case where legacy duty is not payable because it has been paid, I think that the learned judge's construction was not right, and that this is not a case where legacy duty would be payable but for the relationship of the person, but that it is a case where it is not payable because it has been paid, and it has been paid for reasons which do not necessarily require any relationship between the parties at all. The fact that it is brought about here by the relationship is, I think, an accident which we ought not to regard, and therefore the appeal should be allowed, and the information dismissed.

WARRINGTON L.J. I am of the same opinion. The Crown here claim estate duty on a fund consisting entirely of American securities settled by the will of Junius Spencer Morgan, who died in 1890, upon his daughter, Mrs. Burns, for life and after her death upon such of her children as she should appoint. She has appointed to her son and daughter. Consequently the property is now settled, she having died, upon trust for the son and daughter. What the Crown contends is that the property passes on the death of Mrs. Burns and therefore, prima facie, estate duty is payable. Then they say further that this fund is not exempt from estate duty by virtue of the provisions of s. 2, sub-s. 2, of the Finance Act, 1894, because although it is situate out of the United Kingdom, it is property in respect of which, under the law before the passing of the Act, legacy duty would be payable but for the relationship of the persons to whom it passes.

Now, in my opinion, legacy duty in this case is not payable,

not because of the relationship between the parties but by reason of the fact that legacy duty has been paid. It has been paid by virtue of the provisions of s. 12 of the Legacy Duty Act, 1796. The material provision is that at the commencement of the section, which provides that "the duty payable on a legacy or residue, or part of residue, of any personal estate, given to or for the benefit of, or so that the same shall be enjoyed by different persons in succession, who shall be chargeable with the duties hereby imposed at one and the same rate, shall be charged upon and paid out of the legacy as in the case of a legacy to one person." That is to say, it is paid at the death of the testator by whom it is given, or rather, to be accurate, when the legacy is paid by the executors to the legatee.

It happens that in this particular case legacy duty has been paid because the persons who take in succession are chargeable at the same rate, and they are chargeable at the same rate in this particular case by reason of the relationship which they bear to the testator—namely, that of daughter, and issue of daughter. The fact that it is that relationship which brings about the result that the duty is charged at the same rate is merely an accident in this particular case, and it is an accident which does not directly bring about the fact that the legacy duty is paid.

It brings about the immediate result that the duty is at the same rate, and it is because the duty is at the same rate that legacy duty is paid. It seems to me that the real cause why legacy duty is not now payable is that it has been paid, and not because of the relationship of the parties to the testator.

And I would point out, too, that if the contention of the Crown is correct, it would bring about this curious result, that if the legatees had been strangers in blood to the testator, the duty would still have been at the same rate and would have been paid just as it has been paid in the present case, and in that case it must be admitted, and is admitted by the Crown, that the duty they now claim would not be payable. It seems to me an extraordinary result would follow if the contention of the Crown were right.

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There is one other point, which has not been alluded to but which is, I think, worthy of consideration, and that is, what is the meaning of "relationship" in this sub-section? To whom is the relationship? It is described in the section in these terms: "or would be so payable but for the relationship of the person to whom it passes"—the relationship of that person to whom? I should think that it means—but the point has not been argued and therefore this is merely what appears to me at first sight—I should have said it means the relationship of the person to whom it passes to the person from whom it passes. There is no other relationship referred to here at all.

There is another matter to be mentioned. It cannot be contended that the construction here given to the section as applicable to this particular case gives no effect to it, because there is one relationship, at all events, which would come within the words "would be so payable but for the relationship of the person to whom it passes"—namely, the relationship of husband and wife.

On the whole, with all respect to the learned judge, I think his judgment is not correct and that the appeal ought to be allowed, with the usual results.

ATKIN L.J. I agree. On the words of s. 2, sub-s. 2, estate duty is not payable in the case of property situate out of the United Kingdom, unless legacy or succession duty is payable in respect thereof. I think that if legacy or succession duty has already been paid, it plainly is not payable in respect thereof. Then there comes an alternative or further clause—"or would be so payable but for the relationship of the person to whom it passes." To my mind that clearly means, "or being still unpaid would be payable but for the fact that the relationship of the person to whom it passes by law exempts it from being payable." And that is not the case here. In this case the duty is not payable because it has been paid. It is not correct that it would be so payable but for the relationship of the person; it would be payable but for the fact that

it has already been paid, which seems to me to be quite a different thing; and if you look at s. 12 of the Legacy Duty Act, 1796, in no words, so far as I can see, in that section does the provision as to the payment of duty forthwith depend upon relationship. It depends upon the simple fact that the rates of duty are the same.

In one case of legacy duty—quite a common case—where the succession is in a series of gifts or appointments to strangers, it is plain that it is paid there once and for all not because of the relationship but because there is no relationship. Then I think that when you couple with the difficulty of the construction which is put by the Crown the fact that there is a very well known exemption from paying duty on account of relationship—namely, the relationship of husband and wife, the construction of this section becomes quite reasonably plain. I agree, therefore, that the information should be dismissed with costs here and below.

Appeal allowed.

Solicitors: *Bircham & Co.; The Solicitor of Inland Revenue.*

G. A. S.

WILKES v. GOODWIN. ([1923] 2 K.B. 86; 129 L.T. 44). *Dictum of* YOUNGER, L.J. ([1923] 2 K.B. 105; 129 L.T. 54) *approved.* PROPERTY HOLDING CO., LTD. v. CLARK .. [1948] 1 All E.R. 165

[1948] 1 K.B. 630.

Considered. ALLIANCE PROP. CO. v. SHAFFER. [1949] 1 K. B. 367

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[IN THE COURT OF APPEAL.]

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Emergency Legislation—Landlord and Tenant—Rent Restriction—House let with Use of Furniture—Trifling Quantity of Furniture—Increase of Rent, etc., Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 2.

By s. 12, sub-s. 2, proviso (i.) of the Increase of Rent, etc., Act, 1920: "This Act shall not, save as otherwise expressly provided, apply to a dwelling-house bona fide let at a rent which includes payments in respect of board, attendance, or use of furniture." In October, 1920, the owner of a dwelling house at Brighton, of which the standard rent was 55*l.*, let a portion of it as a maisonette to a tenant at a rent of 80*l.* per annum "to include the use of the linoleum" with which certain of the floors were covered. It was conceded that the payment for the use of the linoleum was included in the rent bona fide and not with the object of evading the Act. On an application by the tenant to have the standard rent apportioned:—

Held (by Bankes and Scrutton L.JJ., Younger L.J. dissenting), that unless the linoleum was so trifling in quantity or value as to be negligible, which was a question of fact for the county court judge, its use was sufficient to satisfy the words "use of furniture" in the proviso, and there was no jurisdiction to apportion the rent.

Quaere whether, where furniture is let with a house, the fact that the tenancy agreement provides for a separate payment for the use of the furniture, instead of a lump sum to include rent and furniture, negatives the house being "let at a rent which includes payment in respect of . . . . use of furniture" within the meaning of the above proviso?

APPEAL from Divisional Court.

By an agreement of tenancy dated October 12, 1920, the appellants, Margaret Wilkes and Fanny Jones, became tenants to the respondent, Mrs. Goodwin, of a maisonette consisting of the basement, ground floor, and first floor of a dwelling house, No. 28 Cannon Place, Brighton, together with the landlord's fixtures on a quarterly tenancy at a quarterly rent of 32*l.* 10*s.* inclusive of rates and taxes, the tenants paying a further sum of 1*l.* 5*s.* per quarter for the use of the linoleum in the maisonette. The linoleum in question covered the floors of the three rooms on the ground floor, one of the bedrooms on the first floor, and the bathroom and lavatory. The upper floors of the house were let to another tenant. Before the expiry of the first quarter of their tenancy the appellants negotiated

with the landlady for a reduction of the rent, and at the same time proposed that she should remove the linoleum as they did not want it, having suitable floor covering of their own which they would be otherwise put to the expense of storing. The landlady, however, refused to remove the linoleum as it was fitted to the rooms. The parties accordingly entered into a fresh tenancy agreement dated January 26, 1921, by which the respondent let to the appellants the maisonette on a quarterly tenancy at a quarterly rent of 20*l.* inclusive of rates and taxes "and to include the use of the linoleum in the maisonette." In February, 1922, the appellants applied to the county court of Brighton under s. 12, sub-s. 3, of the Increase of Rent, etc., Act, 1920, for an apportionment of the standard rent of the house, which was 55*l.* per annum, between the two tenements into which the house had been divided. The landlady objected that there was no jurisdiction to make the apportionment because the maisonette was let at a rent which included the use of furniture within the meaning of s. 12, sub-s. 2, proviso (i.), and consequently was not a dwelling house to which the Act applied. The registrar held that, although linoleum probably comes within the description of furniture, to bring a case within the proviso the furniture for which the rent is being paid must have formed a substantial part of the consideration in the minds of the parties, and that as the linoleum in question was in the opinion of the registrar of trifling value, and the tenants did not want it, it did not form any real part of the consideration in the minds of the tenants. He accordingly held that the Act applied, and apportioned the rent of the maisonette at seven-elevenths of the standard rent of the whole house. On appeal by the landlady to the county court judge the judge thought himself bound by the judgment of Shearman J. in *Nye* v. *Davis* (1) to hold that for the purpose of determining whether a house is "bona fide let at a rent which includes payments in respect of board, attendance, or use of furniture" the only matter to be considered is the bona fides of the letting, and that provided the

(1) [1922] 2 K. B. 56.

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Act is not "being evaded by putting in a colourable use of furniture or anything of that kind" it is immaterial how trivial is the attendance rendered or the quantity of furniture supplied. He was of opinion that the fact of an additional 1*l.* 5*s.* per quarter being paid under the earlier agreement for the use of the linoleum showed that the stipulation in the later agreement that the rent should include the use of the linoleum was not a colourable evasion of the Act, and, the letting being bona fide, he held that the case fell within the proviso, and allowed the appeal. The tenants appealed to the Divisional Court. That Court was divided in opinion. Avory J. held that the words of the proviso "let at a rent which includes payments in respect of . . . . use of furniture" must be understood as referring to cases in which the house is let as a furnished house. He pointed out that the same words occur in ss. 9 and 10, the marginal note to the former of which is "Limitation on rent of houses let furnished," and of the latter "Penalty for excessive charges for furnished lettings," and, while conceding that a marginal note is not part of the Act, he was of opinion, on the authority of the judgment of Collins M.R. in *Bushell* v. *Hammond* (1), that it might be looked at as indicating the subject matter with which the section is dealing. Treating then the word "furniture" in the proviso as meaning the furniture of a furnished house, he came to the conclusion that the maisonette in question was not within the proviso; a house let with the use of linoleum on the floors of certain rooms could no more be described as a furnished house than a house or flat let with the use of a door-mat. He agreed that there was no mala fides on the part of the landlady, but thought that the rent did not include payment for the use of furniture within the meaning of the proviso, and was therefore of opinion that the appeal should be allowed. Salter J. on the other hand was of opinion that the decision of the county court judge was right. The Court being evenly divided the judgment of the county court judge stood. The tenants appealed to the Court of Appeal.

(1) (1904) 73 L. J. (K. B.) 1005, 1007.

Flowers for the appellants. The decision of the county court judge was wrong, for two reasons: First, linoleum is not furniture at all. It is not like a carpet, for it is fitted to the floor and cannot well be used for other premises. It is more like a fixture, such as parquet. But even if it is furniture in the ordinary sense of the term it is not furniture within the meaning of the proviso. In *Burns Wallace* v. *Hardingham* (1) Lord Sterndale M.R. and Atkin L.J., sitting as a Divisional Court, held that the existence of linoleum on the floor of a flat did not make it one which came within the meaning of a house let with the use of furniture. That was followed by another Divisional Court, consisting of Bailhache and McCardie JJ., in *Crane* v. *Cox*. (2) Bailhache J. said that the rent must include payment not merely for a piece of furniture, but for such a series of things as would justify the use of the term "furniture," in other words the expression "use of furniture" in the proviso imports that the house must be let furnished. This was the view taken by Avory J. in the present case. But even if the articles of furniture need not be of such number and variety as to justify the description of the flat as a furnished flat, they must be of such substantial quantity or value as to show that the tenant's mind was directed to the payment of a higher rent because of their inclusion. Here the tenants said they did not want the linoleum, and obviously had no intention to pay a higher rent because of its presence. In *Hocker* v. *Solomon* (3) the tenant was to have the use of certain articles of furniture, carpets, etc., without any extra charge, but as the lessor treated them "as of trifling importance, indeed negligible," Sargant J. held that the case did not fall within the proviso to s. 12. In the present case the county court judge wrongly thought himself bound by *Nye* v. *Davis* (4) to hold that where the rent included the use of some articles that could be called furniture the only question to be considered was whether the letting was bona fide, or whether the lessor had included the furniture for the

(1) Unreported.
(2) (1923) 39 Times L. R. 204.
(3) (1921) 91 L. J. (Ch.) 8.
(4) [1922] 2 K. B. 56.

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purpose of evading the Act. The Court did not there decide that bona fides was the only matter for consideration; they found as a fact that the services to be rendered of carrying up the coals and removing the refuse formed a substantial part of the consideration for the rent. Whereas here the county court judge did not consider the question whether the amount of the rent was affected by the presence of the linoleum.

Jacobs for the respondent. Linoleum is "furniture" within the ordinary acceptation of that term. In the Oxford Dictionary it is defined to consist of "movable articles, whether useful or ornamental, in a dwelling house, place of business, or public building." Even if linoleum is temporarily fixed to the floor by nails that does not take it out of the category of movables, for it would be removable as between landlord and tenant just as much as a carpet. Then if linoleum is furniture the question whether the letting of the maisonette satisfied the conditions of the proviso depends upon the bona fides alone, and not upon the quantum of the furniture to be used. The expression "use of furniture" must mean one or other of two things, either the use of such a quantity of furniture as is sufficient to make the house a furnished house, sufficient that is to say to make it reasonably habitable as it stands, or else such a quantity, however small, as is consistent with bona fides. There is no point at which a line can be drawn other than those two. There is nothing in the proviso to suggest that it is confined to furnished houses, therefore the only test of compliance with it is bona fides. If there is a real bargain to let the house at an inclusive rent to cover the use of a small quantity of furniture it is quite immaterial how small that quantity is. Though of course if the quantity were very small it would be evidence of mala fides. This construction of the proviso does not, in a case where the letting is bona fide, deprive the tenant of all the protection intended to be afforded by the Act. It says that to a house coming within the terms of the proviso the Act is not to apply "save as otherwise expressly provided." The case is otherwise expressly provided for in ss. 9 and 10. The

former of those sections provides that where a house is let at a rent which includes payment in respect of the use of furniture the lessor may not take a profit more than 25 per cent. in excess of the normal profit which a similar letting would have yielded in August, 1914, and the latter section provides that if he does extort a larger profit he shall be liable to a penalty not exceeding 100*l.* The effect is that a different measure of rent is provided in the cases to which the proviso applies. The standard rent ceases to have any application, and for it is substituted a percentage of the normal profit of such a letting. In every case which falls within the proviso of s. 12 the tenant gets the benefit of s. 9. Avory J. was wrong in regarding the marginal notes of ss. 9 and 10 as limiting the application of those sections to furnished lettings.

Cur. adv. vult.

March 8. The following written judgments were delivered :

BANKES L.J. This appeal raises the question whether certain premises occupied by the appellants are exempted from the operation of the Increase of Rent and Mortgage Interest (Restriction) Act, 1920, on the ground that they were bona fide let at a rent which included payments in respect of the use of furniture within the meaning of s. 12, sub-s. 2, proviso (i.). The facts of the case have given rise to a strange conflict of judicial opinion : the county court judge differed from his registrar ; the two judges composing the Divisional Court differed both from the registrar and from the county court judge and from each other. The facts lie in a narrow compass. By an agreement made October 12, 1920, the respondent let to the appellants certain rooms on the first and ground floors and basement of a house at Brighton on a quarterly tenancy at a quarterly rent of 32*l.* 10*s.* payable in advance, and a further sum of 1*l.* 5*s.* a quarter also payable in advance for the use of the linoleum in the maisonette. The point does not arise in this case, but we have been

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referred to the two decisions of *Wood* v. *Wallace* (1) and *Hocker* v. *Solomon* (2), in which two learned judges expressed the view that where an agreement provides for a separate payment for the use of furniture the premises do not come within the proviso. I express no opinion upon the point except to say that I think that it is one which will require careful consideration if ever it has to be decided by this Court. This first tenancy agreement was superseded by a later one of January 26, 1921, under which the appellants became tenants of the same premises on a quarterly tenancy at the quarterly rent of 20*l.* "to include the use of the linoleum." It is with reference to this agreement that the conflict of judicial opinion has raged. Except upon two points I do not propose to refer to the different views expressed. The learned county court judge was of opinion that the effect of the decision in *Nye* v. *Davis* (3) was that if the bona fides of the letting was established to his satisfaction he was not at liberty to consider whether the amount of the linoleum included in the letting was trivial or not. In this I think that he was wrong. The decision does not warrant any such conclusion. The learned judge probably acted upon what was only an incomplete report of the case, as in his judgment he refers to a report in the Weekly Notes. The many difficulties which have arisen in the construction and application of the Rent Restriction Acts have been due to a large extent to the infinite variety of the circumstances to which the provisions of the statutes have had to be applied. I feel sure that the way of safety in construing these statutes is, wherever possible, to give to the language used its ordinary meaning, and, whenever possible, to call in aid to assist in construing the statutes some accepted rule of universal application, rather than one depending for its terms upon the individual view of the person called upon to interpret the statutes as to what the Legislature must have, or possibly ought to have, intended in the particular circumstances under consideration. Broadly speaking the statute divides

(1) (1920) 90 L. J. (K. B.) 319. (2) 91 L. J. (Ch.) 8.
(3) [1922] 2 K. B. 56.

all dwelling houses into two classes, the one within and the other outside the provisions of the statute. If by taking action which the statute authorizes a landlord removes his house out of the one class and puts it into the other he is merely doing what the statute allows him to do. To talk of evading the Act under such circumstances is in my opinion a wrong way of approaching the construction of the statute and is likely to lead to a misinterpretation of it. In the case of the proviso now to be interpreted the language used by the Legislature appears to me to be reasonably plain and the application of the proviso can, in my opinion, be ascertained by calling in aid a universally accepted rule of law. If the result is not what the Legislature intended it is for the Legislature to amend the proviso, rather than for the Law Courts to attempt the necessary amendment by investing plain language with some other than its natural meaning in order to produce a result which it is thought the Legislature must have intended. The proviso in question is introduced into the section which defines the dwelling houses to which the Act shall apply for the purpose of excluding a certain class of dwelling house from the operation of the Act. It does so by the application of two tests. The one is the bona fides of the letting and the other is that the rent includes payments in respect of board, attendance, or use of furniture. The first test depends upon a question of intention, the second is a question of fact and of degree. In some cases the tests may run the one into the other, in others they may stand independently of each other. I will take the second test first. Three quite common and well understood words are used, board, attendance, furniture. The words are used quite generally and without any limitation. The statute does not indicate whether full or partial board, complete or intermittent attendance, much or little furniture is aimed at. It uses the words quite generally, and in my opinion any amount of board, any amount of attendance, any amount of furniture, will satisfy this second test, which is not ruled out of consideration by the application of the rule "de minimis non curat lex." The best expression of the application of

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this rule for the purpose of interpreting the proviso that I have come across in the cases to which we have been referred is in the judgment of his honour Judge Granger in the unreported case of *Burns Wallace* v. *Hardingham* (1), where he speaks of the question which he has to decide in reference to certain articles as a question of whether they were so trifling in value or in amount as to be negligible. The first test, as I have already said, must depend upon the question of intention. Where the amount of board, attendance, or furniture said to be included in the rent is so small as to be negligible, that no doubt would go far to dispose of the question of the bona fides of the letting. Apart from the amount of board, attendance, or furniture involved, there must always be, in order to satisfy the first test, the intention to include in the rent a real charge in respect of board, attendance, or furniture. The application of the two tests to the circumstances of any case must, if there is any evidence to support the case for exclusion, depend upon questions of fact which are for the county court judge, and not for the Divisional Court or this Court. In the present case the county court judge has decided the question of the bona fides of the letting, but, under what I consider was an erroneous view of the decision in *Nye* v. *Davis* (2), he refrained from giving any decision upon the question whether the use of the linoleum was so trivial a matter as to be negligible, though he indicated what his opinion might have been had he been called upon at that time to give a decision on that point. Every one who has hitherto been concerned in the decision of this case has accepted the view that linoleum fitted as the linoleum in the present case is comes within the popular meaning of the expression furniture. There can I think be no question on that point. Whether the linoleum in question is so trifling in value or in amount as to be negligible is for the learned county court judge to decide, and not for the Divisional Court or for this Court. There is no dispute about the facts. The floors of four out of the five principal rooms of which the maisonette consists are covered with fitted linoleum. The inference to be drawn

(1) Unreported. (2) [1922] 2 K. B. 56.

from this fact coupled with the other facts in the case is the question which the county court judge alone can decide. In conclusion there is one passage in the judgment of Avory J. to which I think I ought to refer. He attaches importance to the language of the side-note to s. 9, sub-s. 1, as indicating the intention of the Legislature. With all respect to the learned judge and to the author of the side-note I think that it is a misleading guide. In the popular sense a house is not "let furnished" unless it is more or less completely furnished. It cannot be disputed that s. 9 must apply to houses only partially or incompletely furnished as well as to furnished houses. This conclusion drives one back upon the question of what is meant by the expression in the body of s. 9, sub-s. 1, and in the proviso to s. 12, sub-s. 2 (*a*), "payment for the use of furniture." I cannot think that this expression was intended to refer to houses let furnished. On the contrary it appears to me to have been deliberately selected to indicate something different from the letting of a furnished house. If I am correct in this view it strengthens the conclusion that the only safe guide to what constitutes "furniture" within the meaning of the Act is to consider first whether the article or articles in question come within the popular meaning of the word, and if they do then to decide whether they are excluded from consideration by the application of the rule de minimis. The action must go back to the county court for the learned judge to decide this question, and all the costs both here and below must abide the event of his decision.

SCRUTTON L.J. This appeal raises a question which has been the subject of much discussion in the county courts and elsewhere. Linoleum would not at first sight seem a subject likely to arouse acute differences of opinion, but it has given rise to many disputes on the meaning of a provision in the Rent Restriction Acts. The Act of 1915 contained the following proviso; sect. 2, sub-s. 2 (*a*), provided that: "This Act shall not apply to a dwelling house let at a rent which includes payments in respect of board, attendance or use of furniture." The Act of 1920 re-enacted the proviso, inserting

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the words "bona fide" before the word "let"; and inserted the words "save as otherwise expressly provided," which refer to ss. 9 and 10 of the Act of 1920, intended to prevent excessive charges for the use of furniture by making the excess irrecoverable, and providing that the demand of extortionate excess shall be a criminal offence. On the words "rent which includes payment" Roche J. in *Wood* v. *Wallace* (1) has held, and Sargant J. in *Hocker* v. *Solomon* (2) has followed his decision, that the words do not cover a tenancy where one sum is agreed to be payable for rent, and another for board, attendance, or use of furniture, for the rent does not "include a payment." They take the words to refer to cases where one inclusive sum is agreed to be paid for rent proper, and board, attendance, or furniture. Roche J. says that this is a very literal construction and deals with form rather than substance. I agree with him, and reserve myself liberty to consider its correctness when a case raises the point before us. On the rest of the proviso, in my view "board" is not confined to the full board of an ordinary tenant, "attendance" to full attendance, or "furniture" to the complete furniture of a "furnished house." Partial board, partial attendance, or some furniture though the house is not completely furnished, will suffice to bring the proviso into operation. Parliament might have made the other provision, but have not in my opinion done so. If they did intend the other meaning, they apparently have an opportunity this year to make their meaning plain. If some furniture will do, how much will suffice? This seems to me to require an answer to these questions. (1.) Is part of the subject of the letting what can properly be called "furniture"? (2.) Did the parties agree in the rent to include payment for the use of that "furniture"? (3.) Is there a bona fide contract to that effect, or is such a term only a pretended agreement inserted to take the case out of the Act, without involving any real transaction of tenancy or hire of furniture? The first two questions involve the words "a rent which includes payment for the use of furniture," the third the words

(1) 90 L. J. (K. B.) 319. (2) 91 L. J. (Ch.) 8.

"bona fide let." The first question will be answered by taking the ordinary use of "furniture," and excluding things so insignificant as to be negligible, such as a window-wedge, a saucepan, a door-mat, a gas globe. Would the article or articles in question pass under a contract to buy the "furniture" in the house, or a will bequeathing the "furniture" in a house? The answer is a question of fact, if there is any evidence justifying it, and to some extent of degree. As to the second question, what the parties agree must be judged by the words used, and if they have expressly included the particular furniture in the consideration for the rent agreed to be paid, it would seem that the rent "includes payment for the use of the furniture." If it is substantial and important enough to be expressly mentioned in the consideration, or if the landlord in withdrawing it from the house would commit a breach of contract, it is difficult to say that payment for it is not included in the rent. It would be enough, however, that the agreement should cover "use of furniture," if the furniture in fact included is sufficiently substantial to be called furniture. (3.) But the answer to the third question may require consideration of the amount of furniture. A piece of furniture may be so small and insignificant that its express mention may show that the agreement about it is not a bona fide letting, but a collusive agreement to take the case out of the Act, by inserting a sham term in the tenancy. For this purpose it may be necessary to consider the surrounding circumstances and the negotiations of the parties to see whether there was a genuine agreement to let and hire the furniture, or merely a pretended one.

I turn now to the facts of the case. The tenants took eight rooms, part of a house within the Act. They had some linoleum, which they did not want to store, and, therefore, did not want the landlady's linoleum. But the landlady also had some linoleum which she did not want to store, covering the floor of four of the principal rooms, and 63 yards in superficial area. The landlady valued it at 30*l.*, the county court judge puts its value at 15*l.* Any one

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who has recently bought linoleum knows that the price of 60 square yards may represent some substantial figure. The landlady would not let without the linoleum, and the tenants gave way. In the first agreement they agreed to pay 130*l.* rent, plus 25*s.* a quarter for the use of the linoleum. In the second agreement in force at the time of the dispute the tenancy was to be at the quarterly rent of 20*l.* "to include the use of the linoleum in the maisonette." There is no evidence that either lady knew anything about the provisions of the Rent Restriction Act, or made the agreement in this form because of those provisions. The case has already had four opinions pronounced on it, all differing. According to the County Court Rules it went in the first instance to the registrar, who delivered a very careful judgment. He found that linoleum might be furniture, but held that the furniture let "must form a real part of the consideration in the mind of the tenant" . . . . "a substantial part of the consideration in the mind of the parties," and that as "the tenant did not want the linoleum there was not a bona fide letting." But it appears to me that a person who does not want a thing may yet bona fide agree to hire it if he cannot get something he does want unless he hires it, and if under those circumstances he expressly includes it in the consideration for the rent, there is a bona fide letting. The county court judge reversed this decision. He agreed that the linoleum was "furniture," and "furniture within the section." He thought himself bound by *Nye* v. *Davis* (1) to hold that if it was furniture the question of the amount was immaterial, unless there was "a colourable evasion of the Act," and that as there was not a colourable evasion of the Act here (by which I understand him to mean that the parties really bargained whether the tenant should have the linoleum and pay for its use in the rent), its amount was immaterial. But for his view about *Nye* v. *Davis* (1) he would have held that the use of the linoleum was too trivial to be considered. I should have thought this really meant that there was so little linoleum that it could not be properly called "furniture" either in ordinary language or within the meaning of the

(1) [1922] 2 K. B. 56.

Act, but the learned judge had earlier in the judgment found that this linoleum was "furniture" in both senses. The linoleum being "furniture" and it being found that there was no colourable evasion of the Act, I should have thought the result of the judgment of the county court judge correct. "Colourable evasion" must I think mean either that something is treated as furniture which is not furniture, or that a pretence is made to agree a rent for the use of furniture when there is no real agreement, in either case for the purpose of pretending that the letting is outside the Act when it is really within it. If there is "furniture" and the parties honestly intend to include the use of it in the consideration for the rent, it seems to me immaterial that they thereby evade or escape the operation of the Act. In *Nye* v. *Davis* (1) some, though slight, attendance in the flat was part of the consideration for the agreed rent. The Divisional Court finding a bona fide bargain on the subject, held that the tenancy was outside the Act. They did not decide in my view that you could not consider the trivial character of the subject matter in deciding whether it was "attendance" or "furniture," or whether there was a bona fide letting. As the county court judge has, I think, misunderstood the effect of *Nye* v. *Davis* (1), and, anyhow, as his findings appear contradictory, I think a new trial should be ordered to find: (1.) Whether the 63 square yards of linoleum in four rooms is "furniture." On this, trivial character may be considered, though I should have thought the quantity was substantial and not negligible. (2.) If so, whether the parties did agree to include the use of this "furniture" in the consideration for the rent, and therefore payment for it in the rent. The agreement itself seems to answer this question. (3.) Whether the agreement was an honest bargain as to the use of the linoleum. I think the county court judge has already answered this in the affirmative. Triviality of subject matter may disprove this, though I am not sure that the real importance is not whether there is enough linoleum to be "furniture" at all.

The Divisional Court disagreed in opinion, and the judgment

(1) [1922] 2 K. B. 56.

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of the county court judge therefore stood. Avory J. took the view that the statute did not include in furniture an amount less than would suffice to furnish a house, basing this decision on the side-notes to ss. 9 and 10. There is, I think, nothing else than side-notes to support this view. The learned judge refers to one of the few authorities for considering marginal notes, but not to the many, including Willes J., Bovill C.J., James L.J., Jessel M.R. and Lord Esher, to the contrary : see Maxwell on Statutes, 6th ed., p. 76. The side-notes are not part of the Act, and I believe are not considered or amended by the Legislature. I think, therefore, the learned judge put too great reliance on them. If Parliament had meant only to exclude "furnished houses" it could easily have said so. Avory J. agrees that there was no intention to evade the Act, but thinks the county court judge should have determined as a matter of fact (1.) whether there was a rent which included payments for the use of this furniture. This question as I have said is, I think, answered by the agreement. If the landlady had taken away the linoleum, the tenant could have sued for breach of contract, and recovered the reasonable cost of substituted linoleum, as damages. (2.) He should determine whether the linoleum was furniture at all. From the language used it would appear that Avory J. thought the fact that the tenant did not want it was material on this point. I do not understand this, but perhaps the report here is incorrect. Avory J. therefore would remit the case to the county court judge for consideration on these questions, with directions on construction which I think erroneous. Salter J. did not agree. He held that this amount of linoleum was furniture, that a payment for the use of it was included in the rent, and that there was a bona fide letting. He also comments on the language used by the judge at the end of his judgment. I do not myself think that that language is consistent with the earlier part of the judgment, and while agreeing in the main with the judgment of Salter J. I am led to order a new trial here (1.) because the substantial questions here are questions of fact, which I do not think the county court judge

has decided on relevant considerations only, and which the Court of Appeal cannot decide. If we could decide them, I personally should agree with the result of the judgment of the county court judge and Salter J. and hold that there was here a letting in good faith of a quantity of linoleum sufficient to be called furniture at a rent which included payment for the use of it, and that the landlady should succeed. With regard to the other cases cited, in *Burns Wallace* v. *Hardingham* (1) there was an agreement indorsed "Lease of Unfurnished House," wherein a house was let with "Fixtures as in Schedule," and the schedule mentioned (inter alia) linoleum. The county court judge found that the quantity of linoleum was such as to make it "furniture," and, therefore, the house was outside the Act, and the Divisional Court, composed of Lord Sterndale and Atkin L.J., sitting temporarily in the King's Bench Division, reversed the county court judge. I do not disagree with the decision as the parties themselves did not treat the linoleum as "furniture," but as fixtures. In *Crane* v. *Cox* (2) there was a small piece of linoleum in the premises left by a previous tenant. The county court judge had thought he was bound by the present case to hold it was "furniture." The Divisional Court reversed him, and I should agree on the facts, but not with the reasons given by the Court. Bailhache J. thought that furniture must involve a series of pieces of furniture, not a single piece. This would exclude a bona fide payment for the use of a grand piano, a wardrobe, a sofa, or a large dining table, which would in my opinion clearly be "furniture." McCardie J. thought the Court were bound by the decision in *Burns Wallace* v. *Hardingham* (1) already referred to, but he cannot have had before him the facts of and the papers in that case as we had. I should not differ from the decision in that case, but only from the reasons. I regret, therefore, the case must go back for a new trial with such guidance as the county court judge can obtain from the judgments in this Court. The costs of all the proceedings to date should abide the event of the new trial.

(1) Unreported. (2) 39 Times L. R. 204.

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YOUNGER L.J. At one time the facts of this case were in acute controversy. Now, the findings of the learned registrar with regard to them are, I think, accepted by both parties to the dispute. Shortly stated, to the extent to which they are relevant to the broad question before us, they are these. Under an agreement of January 26, 1921, this house, No. 28, Cannon Place, Brighton, so far as its basement of three rooms, its ground floor of three rooms and its first floor of two rooms are concerned, is "together with the use of the linoleum in the maisonette" let by the respondent to the appellants on a quarterly tenancy at an inclusive rent of 80*l.* a year payable in advance. The linoleum referred to belongs to the respondent, the landlady. It covers the floors of the three rooms on the ground floor and of one of the rooms, a bedroom, on the first floor. There is no linoleum either in the three rooms of the basement or in the dining-room, the other and principal room of the first floor. There is some linoleum in the hall, the bathroom and the lavatory of the house. These places, however, are not included in the demise, although the appellants have the use of them in common with the respondent's tenant of the two upper floors. The value of all the linoleum was put by the respondent when before the learned registrar at 30*l.* He, however, was satisfied that it had not cost her anything like that sum, probably not half of it. It is, I think, clear that the learned registrar did not find the linoleum to be worth more than he believed the lady had paid for it. This linoleum is the only article even remotely susceptible of the description of furniture to the use of which it is now suggested that the appellants as tenants of the respondent are entitled. In every other respect the maisonette, as let, was an entirely unfurnished house, and unless the use of this linoleum enjoyed by the appellants under the agreement of tenancy suffices, so far as fixity of tenure is concerned, to take the tenancy out of the Act, this maisonette, as let, is a dwelling house to which without qualification the Increase of Rent and Mortgage Interest (Restriction) Act, 1920, applies.

What on this appeal we have to do is to ascertain, if we can, from the terms of that Act whether the learned county court judge directed himself properly when, deferring as he thought to authority and contrary as I gather to his own unfettered judgment, he held that this maisonette, circumstanced as I have described it, was within the exception in s. 12, sub-s. 2, of the Act a dwelling house "bona fide let at a rent which includes" a payment "in respect of . . . . use of furniture." Upon this question so raised there seems to exist a clear divergence of judicial opinion, of which the end is not yet. In the present case itself, the learned county court judge differed from his learned registrar. The learned judges of the Divisional Court were not in agreement either with one another or with the learned county court judge or with his registrar. I am not quite sure that I find anywhere complete support for the conclusion at which I have myself arrived, but I am glad to think that there is no great difference between the views of Avory J. and my own. Although I am not able to subscribe to the principle of construction by means of which he reaches his conclusion, I have little doubt that in the great majority of cases there would be no difference in result between the application of the principle adopted by him and that which, as it seems to me, is properly permissible. And indeed, when the judgments in this case in the Courts below are considered, and those delivered in other cases dealing with this exception are considered also, it will, I think, be found that underneath a greater apparent diversity of opinion there are really existent only two contrasted views of the exception, although between them the difference is fundamental. Of these views, and in each case in its most extreme form, Avory J. in his judgment here is representative of one and Salter J. of the other. In Avory J.'s opinion the exception in the statute is in this part of it, dealing with the letting of furnished houses, a conclusion which of course carries with it the requirement that the furniture left for use must both in quantity and effect be substantial. In Salter J.'s view, on the other hand, so soon as the judge of fact is satisfied

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that premises are bona fide let at a rent which includes a payment in respect of the use of furniture, he has no power to look and see whether the element of furniture is large or small: that question is, in Salter J.'s opinion, relevant only on the issue of good faith. On this principle many lettings where, as in the present case, the furniture left for use is relatively insignificant will be within the exception. Here is to be found the real line of cleavage between the two conceptions of the clause. Now, with the views of Salter J. so expressed, Horridge and Shearman JJ. would, I think, as is shown by their decision in *Nye* v. *Davis* (1), on the associated word "attendance" be in sympathy. On the other side would be ranged the Master of the Rolls and Atkin L.J., as is shown by their observations in *Burns Wallace* v. *Hardingham* (2), whether or not those observations were necessary for the actual decision, and also Bailhache and McCardie JJ., as is shown by their judgments in *Crane* v. *Cox*. (3) These all would be of opinion, putting it broadly, that it was at least necessary in order to bring a letting within the exception that the tenant should have the use of a substantial quantity of furniture.

It is in that state of the authorities that we are in the Court of Appeal, constituted as such, called upon for the first time to deal with this exception, and it being manifest that its true effect has become a matter of widespread general interest affecting many tenancies all over the country, the ascertainment of its true range has become an issue almost of first importance. Now, desiring as I do, to deal with the question on the most general lines possible, I will keep separate three aspects of it, special to this case, which were much discussed in the Courts below. The first of these three aspects was concerned with the question whether the letting here was "bona fide"; the second with the question whether the linoleum was furniture within the meaning of the exception; the third with the question whether in this case the rent in fact included any "payment" for its use. As to the first the most relevant

(1) [1922] 2 K. B. 56. (2) Unreported.
(3) 39 Times L. R. 204.

facts are that this present Restriction Act was passed on July 2, 1920. The first tenancy of this maisonette was entered into on October 12, 1920. That was a quarterly tenancy at an inclusive rent of 130*l.*, with a further sum of 1*l.* 5*s.* a quarter payable in advance for the use of the linoleum in the maisonette. Now on November 29, 1920, Roche J. in *Wood* v. *Wallace* (1) decided that a payment for "attendance" exclusive of and in addition to the rent left the tenancy outside the exception of s. 12, sub-s. 2, of the Act of 1920. It is manifest if that case was well decided that the tenancy agreement of October 12, 1920, was also outside the exception. And certain it is that if *Wood* v. *Wallace* (1) was law its effect was got over by the altered arrangement as to the use of the linoleum embodied in the subsisting agreement of January 26, 1921, which superseded the agreement of October. But even if a relevant test of the absence of bona fides in these cases be that the provisions of the tenancy agreement are framed with the intention of keeping the letting outside the Act—a proposition with which I am unable to profess any sympathy—I do not find that the test is complied with here. It can at the most be a matter of suspicion whether the judgment of Roche J. was known to any of the parties to the present agreement. I doubt very much if it was. The form of that agreement, in my judgment, is more clearly referable to the circumstances to be alluded to later which raise the third of these particular questions. But even if this were not so, in my judgment, as at present advised, the agreement of October 12, 1920, was in point of form more clearly within the exception than is the agreement of January 26, 1921. I am not prepared at the moment to accept upon this point either the decision of Roche J. in *Wood* v. *Wallace* (1) or the decision of Sargant J. in *Hocker* v. *Solomon* (2) which followed it. These decisions, as it seems to me, ignore two important considerations both of which militate against them. The first of these is that the word "rent" in this exception surely means not rent in the strict

(1) 90 L. J. (K. B.) 319. (2) 91 L. J. (Ch.) 8.

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sense but the total payment under the instrument of letting. The exception assumes that "rent" so called may include for example "board," payment of which is not rent. I am here paraphrasing the statement of Shearman J. in *Nye* v. *Davis* (1), with which I agree. And the second consideration is that the exception contemplates separate "payments" for any of the three things it specifies—namely, board, attendance, use of furniture, the plural "payments" being in striking contrast with the singular "payment" in s. 9, where only one of these three things, namely, use of furniture, is being dealt with. In my judgment so far from the exception contemplating primarily a tenancy in which rent strictly so called is with these other payments or one of them lumped together under one composite payment designated rent, the contrary is the case. Such a composite payment may indeed be within the exception; but separate payments are within its more immediate contemplation. Having said so much I need not discuss the other grounds on which it was suggested that this tenancy was not bona fide. I am not prepared to hold on any of them that this was other than a bona fide letting within the meaning of the exception. Upon the second question whether the linoleum here was "furniture" within its meaning, I am not prepared to say it was not. But the question to my mind is not free from difficulty. That linoleum would be fairly included amongst a collection of articles useful or ornamental and properly described as furniture of a house, I do not doubt. But it is to my mind not quite the same thing to say that, with no addition of any other article of furniture to support it, some squares of linoleum can properly satisfy the words "use of furniture" in this exception. However, I am not prepared to say that they cannot. I concur in the decision that they may. Whether they do so here is another matter. The third of these particular questions—namely, the question whether in this case the reduced rent of 80*l.* payable under the agreement of January 26, 1921, in fact included any "payment" for the use of this linoleum is to my mind

(1) [1922] 2 K. B. 56.

one of much greater difficulty. The learned registrar's findings on this subject are very significant. The inference I should myself be inclined to draw from the facts which he finds is that the reduced rent of 80*l.* was arrived at without any reference at all to the linoleum, which was merely thrown in as much for the convenience of the respondent as of the appellants. I do not however press this view. I prefer, as I have said, to dispose of this case upon more general considerations in the hope that such treatment of it, even if it fail to find acceptance, may be of greater assistance in other cases.

Now it may, perhaps, lead to an ascertainment of the true range of this exception if we trace its development historically. It is first found in the Increase of Rent Act of 1915, s. 2, sub-s. 2, in these words : "Provided that this Act shall not apply to a dwelling house let at a rent which includes payments in respect of board, attendance, or use of furniture." Two things are noticeable with reference to this form of the exception. The first is that there is no requirement here, as there is in the exception in its current form, that the letting shall be bona fide. One result of that is, if Salter J.'s view of the present exception be correct, that under this exception in the Act of 1915 a tenancy to which the Act otherwise applied was in every case taken entirely out of it if the tenant under his agreement were given the use of the most meagre article of furniture, for example, a table or a chair. Whether this result is consistent with any reasonable view of the exception I will examine later. The second matter to notice in relation to the exception in the Act of 1915 is that its effect was to exclude altogether from the operation of that Act every case to which the exception applied. This under the exception in the existing Act is still true where the payments are made in respect of board and of attendance. Where, however, as in the present case, the payment is said to be made in respect of "use of furniture" the exclusion is only partial. The tenant under s. 9 of the Act of 1920 may in cases otherwise within the Act still control the amount of rent which he can

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be called upon to pay. He loses, however, the benefit of any fixity of tenure to which tenants holding tenancies to which the Act applies are entitled. This provision now to be found in s. 9 of the present Act first appeared in a different form in s. 6 of the Act of 1919. Further inquiry into the difference in effect between the provision in s. 6 of the Act of 1919 as applied to the exception in the Act of 1915, and the provision of s. 9 of the present Act as applied to the exception in s. 12, sub-s. 2, would be interesting, and I think striking in result. But the occasion for it does not arise in the present case and I pass on. The exception in the Act of 1915 remained operative until that Act was repealed by the Act of 1920. The exception now contained in s. 12, sub-s. 2, takes its place. I do not need to set it forth again at length. Now this series of Acts progressively extending the value of the dwelling houses to which they applied, although in some respects expanding in the later Acts the greatly curtailed privileges of landlords under the 1915 Act, are all of them in this matter tenants' Acts designed to secure for the tenants of houses to which they apply fixity of tenure at rents not exceeding prescribed limits. It is common to all the Acts that the houses to which they are applicable are houses of limited annual values in which the tenant is left to provide for himself what are called in the exceptions board, attendance and furniture. The exception in the 1915 Act excludes from all the benefits of that Act, and the exception in the Act of 1920 excludes from nearly all of its benefits, cases where the accommodation let and hired does include board, attendance or use of the landlord's furniture. Now if we bear in mind, as the Court it seems to me must bear in mind, that these are in this regard essentially tenants' Acts, it is prima facie unlikely that the Legislature would exclude from their benefit except on substantial grounds tenancies to which otherwise the Acts clearly apply. If therefore the words which it has used to describe these excepted tenancies are equally susceptible of two meanings, one indicating a substantial service or consideration, while the other is satisfied by a trivial or insignificant one, it would I think be the duty of the Court to prefer the first of the two

meanings. A fortiori would this be its duty if it finds that two of the words so capable of a double meaning are linked with a third, which is exclusively or equally susceptible only of one—and that a substantial service on the part of the landlord. Such I think will appear to be the case here. I might express this aspect of the matter in another way. In my judgment, in construing these Acts, the Court before adopting a construction of any provision in them which would deprive tenants of benefits presumably intended to be provided for them, must satisfy itself that that is the only construction properly to be placed on the words of the Act. Whatever may be said of the construction which the majority of the House of Lords felt compelled in *Kerr* v. *Bryde* (1) to place upon the words "would be entitled to obtain possession," as used in the Act, this at least is true that the result of that construction operated in favour of the tenant, which would not be the case if the views adopted here by Salter J. are to prevail. In *Nye* v. *Davis* (2) Horridge and Shearman JJ. held that an obligation on the part of the landlord of a flat to bring up his tenant's coals once a day and remove his ashes was "attendance" sufficient to take the tenancy in that case out of the Act. Salter J. in the present case has expressed the opinion that the provision by the landlord of a minimum of furniture might be sufficient to bring a tenancy within the other exception "use of furniture." I cannot refrain from saying that if either of these views be correct the result is, in my judgment, to make something very like nonsense of this exception. It seems to me impossible to believe that the Legislature could have intended by it that a tenant should lose all the benefit of the statute, because in the one case he had not to carry up his own coals, and the substantial benefit of the Act, because in the other he had the use of a few of his landlord's chairs. And it will not be forgotten that under the exception in the Act of 1915, the full benefit of the Act was on this construction lost in both cases, with no protection at all from the presence of the words "bona fide." Accordingly I ask myself, is the Court

(1) [1923] A. C. 16.

(2) [1922] 2 K. B. 56.

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imperatively required by the force of the language used to place such a construction upon this exception. In my judgment nothing less constraining will justify it in doing so, and, as I see it, we have no such burden laid upon us. I quite agree that as a mere matter of language such a service as carrying up coals is "attendance," partial though it be. I agree also that in the same way the use of a few chairs is the use of furniture, insignificant though they be. As a mere matter of words each of these expressions may quite properly be taken to mean very little, although with at least equal propriety they may be taken to connote a great deal more. But in my judgment so much may not be said of the third word "board" with which these two other expressions are associated. The word chosen is, it will be noticed, not "food" or "drink," but "board." "Food" may of course mean much or little; "drink" I hope is entitled to an equally non-committal construction. "Board," however, is a different word altogether. It is defined, I see, in the Oxford Dictionary as "daily meals provided in a lodging or boarding house according to stipulation; the supply of daily provisions." The word without suffix or affix suggests to my mind sufficiency. It could never, I think, be satisfied by the provision, say, of an early morning cup of tea. If you wish to accentuate its abundance you may call it "full board," but if you would convey that it is limited then you must call it "partial" or qualify it by the use of some other adjective of limitation. It appears to me that the natural interpretation of the word as we find it in this exception involves the conception of a provision by the landlord of such food as in the case of any particular tenancy would ordinarily be consumed at daily meals and would be obtained and prepared by a tenant for himself, if it were not provided by somebody else. If a de minimis construction of the word is open at all, and deferring to my Lord I must recognize that it is, it is at least, I think, not so fairly open as the other, a consideration which confirms the conclusion to which I have already on broader grounds been led with reference to that word, as well as to both of the other two expressions of the

exception, "attendance" and "use of furniture." And if the reasoning of this judgment be so far justified, does it indicate any useful test or standard within the four corners of the Act, by reference to which in any particular case the judge of fact can direct himself upon the issue whether the tenancy in question is within the exception of the statute or is outside it? I think it does. Remembering that the Act applies to prescribed tenancies, of what I may call for brevity unfurnished and unattended houses, I think it may be properly said that a tenancy is within the exception and is outside the Act if the landlord receives payment for and provides and prepares food for his tenant's meals, which having regard to all the circumstances of the case the tenant would otherwise ordinarily provide for himself; or provides such attendance as for ordinary household purposes the tenant would in the circumstances otherwise provide for himself; or provides for the tenant's use so much furniture that when it is in place the house can no longer be fairly described as an unfurnished house. Notwithstanding the side-note to s. 9, it is not I think permissible to say, as Avory J. does, that the words "use of furniture" necessarily import that the house must be, in the ordinary intendment of language as applied to the particular residence, "a furnished house." But in my judgment to satisfy the words "use of furniture" in the place where they are found it is at least essential that the furniture in the house of which use is enjoyed is sufficient in quantity and character to require the judge to say that the house let is no longer one to which the Act normally applies—namely, an unfurnished house. This Act applies to many different kinds of houses, and to tenancies in all parts of the country varying toto cælo one from another. What is "board," "attendance" or "use of furniture" in relation to one tenancy may be nothing of the kind in relation to a second. The county court judge is the judge of fact in every disputed case, and he will of course have regard to all its circumstances. Directions for his guidance, if they are to be sound, must therefore be general. For that reason they may not in every case be helpful. But these which I

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have ventured to indicate are, at all events, in my judgment not without justification from the terms of the Act itself; and they would help, I should hope, to decide this and many other cases. I am of opinion that this appeal should be allowed, and for myself, although I cannot entertain much doubt as to the result if it were, I would be for referring the case back to the learned county court judge to decide the question between the parties, directing himself by the considerations which I have endeavoured in this judgment to explain.

Appeal allowed.

Solicitors for the appellants: *Graham Hooper & Betteridge, for Goodman & Goodman, Brighton.*

Solicitors for the respondent: *Radford & Frankland, for Lord Thompson & Weeks, Brighton.*

J. F. C.

C. A. 1923 *March* 19.

[IN THE COURT OF APPEAL.]

In re WINGFIELDS.

Practice—Order to tax Solicitor's Bill—Appeal, "Matters of practice and procedure"—Judicature Act, 1894 (57 *&* 58 *Vict. c.* 16), *s.* 1, *sub-s.* 4.

Where a solicitor delivers to his client a bill of costs for work done in the conduct of an action an order made by a judge at chambers for the taxation of the bill is a "matter of practice and procedure," and an appeal from such an order lies direct to the Court of Appeal.

APPEAL from a judge at chambers.

Mr. L. A. Wingfield acted as solicitor for C. M. Stringer in an action in the King's Bench Division of *Stringer* v. *Bush*. As a result of the action the plaintiff obtained judgment for 550*l.* and costs. The defendant Bush paid the damages and the taxed costs to Wingfield, who claimed to retain as against his client a certain portion of the money so received by him under an alleged agreement whereby Stringer agreed, in consideration of certain matters unconnected with the action, to pay to Wingfield the difference between the party and party costs recovered from Bush and Wingfield's bill as

delivered, and to waive his right to a solicitor and client taxation. Stringer obtained an order against Wingfield for the delivery of a bill of costs, and the bill was delivered. He then took out a summons for an order that the bill of costs in relation to the action of *Stringer* v. *Bush* should be referred to the taxing officer for taxation. The Master in chambers made the order asked for, and on appeal his decision was affirmed by the judge in chambers.

Wingfield appealed to the Court of Appeal.

Blanco White for Wingfield.

Merriman K.C. and *Cyril King* for Stringer. There is a preliminary objection. An order for taxation of a solicitor's bill is not a matter of practice and procedure and consequently an appeal from an order of a judge at chambers directing such a taxation lies to the Divisional Court under Order LIV., r. 23, and not to the Court of Appeal under the Judicature Act, 1894, s. 1, sub-s. 4. The expression "matters of practice and procedure" refers to applications made to the Court in the course of proceedings already pending before the Court, and excludes an application constituting the first step in an independent proceeding. The ordinary order to tax a solicitor's bill is the commencement of an independent proceeding, even though the costs were for services rendered in the conduct of an action. It is not entitled in the action in connection with which the costs were incurred, but is made upon an originating summons and entitled: "In the Matter of A. B., gentleman, etc." In *In re Jackson* (1) the Divisional Court held that an appeal from the refusal of a judge to order the delivery of a bill of costs for taxation was rightly brought to the Divisional Court, on the ground that the application for the order was not in the course of a cause or matter already before the Court. Similarly in *In re Marchant* (2) the Court of Appeal held that an order of a judge at chambers made upon an originating summons directing a solicitor to pay to the plaintiff a sum of money specified in the summons is not a matter of practice and

(1) [1915] 1 K. B. 371. (2) [1908] 1 K. B. 998.

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procedure. These cases are consistent with *In re Oddy* (1), where a summons for a review of taxation was held to be a matter of practice and procedure, for a review, which stands on an altogether different footing from an appeal against the order to tax, is a step in the taxation proceeding which is already before the Court. So too in *Yonge* v. *Toynbee* (2), where a solicitor, not knowing that his client had become a lunatic, by mistake defended an action against his client without authority, and an application was made by the plaintiff that the solicitor should personally pay his costs, it was held that the application was a matter of practice and procedure and that the appeal lay direct to the Court of Appeal, for there the application was made in the action and not by way of an independent proceeding. Secondly, even where the application is made in the course of proceedings already before the Court it is not a matter of practice and procedure if the order asked for will, when made, be a final order. In *In re Jackson* (3) Rowlatt J. said: "The words 'practice' and 'procedure' are now generally understood to refer to interlocutory matters arising in proceedings in the High Court." And an order for taxation of a solicitor's bill is a final order, for it finally determines the rights of the parties: *In re Reeves.* (4)

Blanco White was not called upon to answer the preliminary objection.

BANKES L.J. With objections of this kind involving discussions as to whether an appeal has been brought to the right Court I have no sympathy, and I only wish that some rule could be framed in sufficiently clear language to render such discussions unnecessary. The question as to what "matters of practice and procedure" include was raised in Lord Esher's time in connection with an order for summary judgment under Order XIV. in *Cannon Brewery Co.* v. *Gilby.* (5) There an appeal against an order of Day J. at

(1) [1895] 1 Q. B. 392.
(2) [1910] 1 K. B. 215.
(3) [1915] 1 K. B. 371, 376.
(4) [1902] 1 Ch. 29.
(5) (1896) 75 L. T. 407.

chambers giving leave to the plaintiffs to enter final judgment under Order XIV. was brought direct to the Court of Appeal, and an objection was taken that the appeal had been brought to the wrong Court. That objection was summarily dismissed by Lord Esher in a single sentence: "We cannot agree with the preliminary objection which has been raised." Lopes and Rigby L.JJ. concurred. That finally disposed of that point, so that that particular objection has never been raised again. We have now to deal with a similar objection in connection with an order for taxation of a solicitor's bill of costs. Whether such an order is a matter of practice and procedure is a question which is frequently arising, and I should wish if possible to dispose in like manner as Lord Esher did of that objection and put an end to further arguments on the subject, without entering into any discussion of the nice distinctions which have been drawn in the various cases to which we have been referred. It is enough for me to say that in my opinion wherever there has been an action, an application for an order to tax the solicitor's bill for services rendered in the conduct of that action is a matter of practice and procedure, and an appeal is rightly brought to this Court. I have been through the authorities cited to us and I do not think that that opinion is in conflict with any of them, while it is directly supported by what was said by Buckley L.J. in *Yonge* v. *Toynbee* (1): "The expression 'practice and procedure' is not confined to steps in the action itself, but covers also matters in connection with the action." Here the application for taxation, though not made in the action, was made in connection with the action, being in respect of the costs incurred by the solicitor in the conduct of it. The preliminary objection fails.

SCRUTTON L.J. If an order is made in a matter of practice and procedure the appeal from it lies to this Court notwithstanding that the order is a final order. In this case there was an action in which the plaintiff obtained judgment against the defendant for a certain sum of money and costs.

(1) [1910] 1 K. B. 215, 220.

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That money and the costs were paid by the defendant to the plaintiff's solicitor, and the plaintiff and his solicitor are now working out the financial result of the action and of the plaintiff's employment of the solicitor, and there arises a question whether there is or is not a valid agreement fixing the amount of the remuneration which the solicitor shall receive from the plaintiff. It appears to me that that comes exactly within the language used by Buckley L.J. in *Yonge* v. *Toynbee* (1), in which Swinfen Eady L.J. concurred, and therefore, though I think we are bound by *In re Reeves* (2) to say that it is a final order, it is a matter of practice and procedure within the meaning of the Act. I agree that the preliminary objection fails.

YOUNGER L.J. I am of the same opinion. The fact that an order is a final order does not prevent it from being a matter of practice and procedure. An order for the taxation of a solicitor's bill has the same element of finality as an order for summary judgment under Order XIV., for it contains a direction that the amount found due on taxation shall be paid without the necessity of any further application to the Court. Now it was decided as far back as 1896 that an order for leave to enter final judgment under Order XIV. is a matter of practice and procedure. But if so I can see no reason why an order for taxation should not equally fall within that description.

Objection dismissed.

Solicitors for the respondent: *Nisbet, Drew & Loughborough.*
Solicitor for the appellant: *Wingfield.*

(1) [1910] 1 K. B. 215, 220. (2) [1902] 1 Ch. 29.

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JONES BROTHERS (HOLLOWAY), LIMITED *v.* WOODHOUSE.

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Jan. 25.

Hire Purchase—Execution by Creditor of Hirer—Fieri facias—Sale of Goods by Sheriff—Payment of Proceeds of Sale to execution Creditor—Action by Owner of Goods for Money had and received—Delay—Estoppel—Apportionment of Proceeds of Sale.

Under a hire-purchase agreement the plaintiffs let to the tenant of premises certain furniture the value of which was about half of that of all the goods upon the premises. The defendant, who was the lessor of the premises, having recovered judgment against the tenant for arrears of rent, obtained a fieri facias thereon, under which the sheriff seized all the goods on the premises and some days later, on April 27, 1921, sold them by public auction. The sale realized 105*l.* 8*s.* 8*d.*, and, after deduction of the sheriff's charges and other sums, about one-half of that amount, or 52*l.* 10*s.* 6*d.*, was received by the defendant in respect of the judgment debt. The plaintiffs were informed of the seizure of the goods some days before the sale, but they gave no notice to any one that the goods hired belonged to them, and they made no inquiries until May, 1922, when they for the first time learned of the execution and sale. In an action by the plaintiffs against the defendant, to recover the sum last above mentioned as money had and received by the defendant to the use of the plaintiffs:—

Held, that the action for money had and received was well founded.

Held also that in the circumstances the plaintiffs were not estopped from maintaining the action by reason of their not having informed the sheriff as agent of the defendant or at all, that the goods hired belonged to them and should not be sold.

Dean v. *Whittaker* (1824) 1 Car. & P. 347 and *Duffill* v. *Spottiswoode* (1828) 3 Car. & P. 435 held inapplicable.

Held, further, however, that the plaintiffs were not entitled to recover the whole amount received by the defendant, but only a proportion thereof corresponding to their share of the goods sold.

APPEAL from Clerkenwell County Court.

By a lease dated October 12, 1920, the defendant, Mrs. Clara Woodhouse, let to one Leon de Martelaere the shop and basement floors of the premises No. 30 Bishop's Road, Paddington, in the county of London, for the term of fourteen years from June 24, 1919, at the yearly rent of 95*l.* payable quarterly.

By an agreement also dated October 12, 1920, and made between the plaintiffs, Messrs. Jones Brothers (Holloway), Ld., drapers and house furnishers, and the said Martelaere, it was agreed (inter alia) as follows: (clause 1) that the

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plaintiffs at the request of Martelaere should put the chattels mentioned in the schedule to the agreement, which were admitted to be of the value of 285*l.* 4*s.*, upon the above-mentioned premises subject to the terms and conditions therein; (clause 2) that Martelaere should pay to the plaintiffs 165*l.* 4*s.* in consideration of the option to purchase therein contained, for which credit only would be given in the event of a purchase being effected or under clause 8, and also a further sum of 5*l.* per month so long as he saw fit to continue the hire subject to clause 8; (clause 3) that the said hirer should not remove or suffer the chattels to be removed from the said premises and should keep them in his possession; (clause 8) that if the hirer returned the chattels under clause (A) thereof (infra) or the plaintiffs retook the said goods before the expiration of ten months from the date of the agreement, the hirer agreed to pay a further sum, which with the previous payments equalled the sum of 172*l.*; (clause 9) that if the said hirer should make default in payment of any of the said instalments or fail to observe or perform any of the terms thereof on his part to be observed or performed or if any of the said articles should be seized or taken under any legal process or distrained upon for rent or otherwise the plaintiffs should be entitled to terminate the hiring, and it should be lawful for them their servants or agents to enter any place occupied by the hirer or in which the said goods might be and to seize and retake possession of and remove the same without prejudice to their right to recover any arrears of hire or any other sums due under the agreement or damages for the breach thereof and damages under clause 8; (clause 11) that if the hirer should be desirous of buying the said chattels and should pay to the plaintiffs the sum of 285*l.* 4*s.* less sums then already paid as rent, and should in all respects observe and perform all the agreements and provisions on his part, the said chattels should become his property, but unless and until a purchase was effected, he should remain and be only a bailee of the plaintiffs; And it was further agreed (A) that the hirer might at any time terminate the hiring by returning the said chattels

without prejudice to the plaintiffs' rights under other clauses of the agreement, particularly under clause 8.

The plaintiffs at the request of Martelaere put the said goods upon the said premises accordingly.

In and after December, 1920, Martelaere was in arrear with his monthly payments of 5*l.* under the agreement, and the plaintiffs were in a position to terminate the hiring and retake possession of the goods under clause 9 of the agreement.

On March 19, 1921, the defendant recovered judgment in the High Court against Martelaere for possession of the said premises and for arrears of rent.

On April 2, 1921, the defendant obtained a combined writ of possession and fieri facias, and in levying execution thereunder the sheriff seized the goods and chattels upon the said premises, of which about one-half belonged to Martelaere himself, while the other half were those comprised in the said agreement of hire purchase.

On April 27, 1921, the sheriff sold all the said goods and chattels by public auction. The sale realized 105*l.* 8*s.* 8*d.*, of which the defendant received 52*l.* 10*s.* 6*d.* in respect of her judgment debt and costs, the remainder being applied in payment of sheriff's charges and other costs of execution and in the handing over of a small balance to Martelaere.

On August 15, 1921, the plaintiffs brought the present action against the defendant in the county court claiming the amount last mentioned as money had and received by the defendant to the use of the plaintiffs. The defendant in her particulars of defence stated that she never received the alleged or any sum to the use of the plaintiffs; that Martelaere was at all material times entitled to the possession of the goods and had an assignable interest in them; that the defendant never caused any of the goods to be sold; that the goods were sold, if at all, by the sheriff acting under legal process and in execution of a judgment of the High Court; and that the defendant never received the alleged proceeds of sale of the goods.

At the trial in the county court evidence was given by W. Blackett, the chief clerk to the plaintiffs, who stated

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that the plaintiffs first heard in April, 1921, that the goods had been seized, that he went to the premises on a Sunday towards the end of that month and found them stripped of the goods, that at the beginning of 1922 he caused inquiries to be made into the matter, and that it was not until May, 1922, that he first heard of the writ of fieri facias and the sale of the goods thereunder. The following facts were found: that the seizure of the goods took place some days before the actual sale on April 27, 1921; that it was also some days before the sale that Martelaere told Blackett on behalf of the plaintiffs that the goods had been seized; and that it was either on Sunday, April 17, 1921, or Sunday, April 24, 1921, but in any event before the date of the sale, that Blackett in consequence of his having received that information went to the premises in question.

The county court judge held that the plaintiffs were entitled to bring the action for money had and received; and that the defendant was liable, if at all, for the whole of the net proceeds of sale, and not only for a proportion thereof corresponding to the plaintiffs' share of the goods sold; but that the plaintiffs were estopped from recovering, inasmuch as when they heard that the goods had been seized they did not inform the sheriff that they claimed the goods, made no inquiries, and did not attempt to stop the sale, and it was not until the spring of 1922 that they took any steps to look for or trace the goods; and he, therefore, gave judgment for the defendant.

The plaintiffs appealed.

Serjeant Sullivan K.C. and *Carthew* for the plaintiffs, appellants. The plaintiffs' goods in the possession of the execution debtor having been seized and sold by the sheriff and the proceeds of sale paid over to the defendant, the execution creditor, this action by the plaintiffs against the defendant to recover the proceeds as money had and received by her to their use is well founded. By the Bankruptcy and Deeds of Arrangement Act, 1913, s. 15, where goods in the possession of an execution debtor are seized and sold by the

sheriff, the purchaser acquires a good title to the goods and the true owner cannot sue the purchaser or the sheriff in any form of action. But where the proceeds of sale have been paid over to the execution creditor, the Act does not prevent the owner from bringing an action against him for money had and received.

The plaintiffs are not prevented by estoppel from maintaining their claim. In order that one person may be estopped by his conduct as against another it is essential that he should be under a duty towards the latter to make some representation, that he should have failed to perform that duty, and that the person to whom the duty was owing should have altered his position and would suffer damage if the estoppel did not operate: *Freeman* v. *Cooke* (1); and per Blackburn J. in *Swan* v. *North British Australasian Co.* (2)

[McCARDIE J. referred to *Pickard* v. *Sears* (3) and *Ramsden* v. *Dyson.* (4)]

In the present case the plaintiffs were under no duty towards the defendant or the sheriff as the agent of the defendant or otherwise to represent that the goods in question belonged to them and should not be sold. If and so far as they were under any such duty they duly performed it. As soon as their agent heard in April, 1921, that the goods had been seized he went to the premises. He could not then resume possession of the goods, because they had already been removed from the premises. He could not inform the sheriff or the defendant that the goods belonged to the plaintiff, and should not be sold, because he did not know until May, 1922, that a fieri facias had been issued. Further, the plaintiffs are not estopped from making their claim on the ground that it causes any damage to the sheriff or the defendant. They are not questioning but affirming the act of the sheriff in selling the goods, and are merely seeking to recover the proceeds of sale as representing the goods.

J. B. Matthews K.C. and *E. L. Hadfield* (*P. E. Sandlands*

(1) (1848) 2 Ex. 654.
(2) (1862–3) 7 H. & N. 603; affirmed 2 H. & C. 175; 32 L. J. (Ex.) 273.
(3) (1837) 6 Ad. & E. 469.
(4) (1866) L. R. 1 H. L. 129.

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with them) for the defendant, respondent. It is necessary first to consider whether and to what extent an action for money had and received lies in such a case as this. At common law the sheriff in the absence of any authority or direction from the execution creditor levied execution not as the agent of the execution creditor, but as the minister of the law, and if in doing so he seized the wrong goods, neither he nor the execution creditor was liable to an action by the true owner of the goods: *Whitmore* v. *Greene*. (1) If the execution creditor directed the sheriff to seize and sell the wrong goods then no doubt the owner of the goods might sue either the sheriff or the execution creditor in either trespass or trover, or where the goods had been sold he might sue either of these parties for money had and received: see *Whitmore* v. *Greene* (1); *Hitchin* v. *Campbell* (2); and *Cooper* v. *Chitty*. (3) Where, as in the present case, the execution creditor did not authorize the sale, and the owner of the goods sued him for money had and received, the owner could only recover the money actually received by the execution creditor from the sheriff after deduction of the costs of the execution. Though the Act of 1913 does not protect the execution creditor, yet it does not in any way increase his liability.

Assuming that this action is well founded, the plaintiffs are prevented by estoppel from maintaining their claim. Where under an execution the sheriff seizes goods of a third party, as soon as it comes to the knowledge of that party that the goods have been seized, he is under a duty to inform the sheriff that the goods are his and should not be sold, and if he fails in that duty he cannot at common law maintain an action against the sheriff for the goods: *Dean* v. *Whittaker* (4); and *Duffill* v. *Spottiswoode* (5); and see Mather on Sheriff Law (1894), p. 73; and on the same principle he cannot maintain an action against the execution creditor for the proceeds of sale of the goods as money had and received to his use. Here the plaintiffs on learning of the seizure of the goods gave no

(1) (1844) 13 M. & W. 104.
(2) (1772) 2 W. Bl. 827.
(3) (1756) 1 Burr. 20.
(4) 1 Car. & P. 347.
(5) 3 Car. & P. 435.

notice to the sheriff of their interest in the goods and their claim is therefore barred. Where a person having to his knowledge a legal right to goods or things of any other kind, by abstaining from asserting it allows another person to make a mistake as to that right and to alter his position on the faith of his mistaken belief, there is such acquiescence on the part of that person as will prevent him from enforcing his right: *Willmott* v. *Barber* (1); *Gregg* v. *Wells*. (2) In the present case the plaintiffs, on learning of the seizure of their goods, made no inquiries, took no steps to trace the goods or recover possession of them, and gave no notice to the sheriff that the goods were theirs and should not be sold, and they allowed more than a year to elapse before they discovered that the goods had been sold under a fieri facias; and their conduct therefore amounted to such acquiescence as prevents them from asserting their right to the goods or their proceeds as against the defendant. Owing, moreover, to the delay of the plaintiffs the position of the defendant has been altered for the worse, because the remedies which she originally had against the execution debtor, her tenant, would no longer be available to her, and, if she were required to hand over to the plaintiffs the money which she obtained by the execution, she would be left without any relief. On these grounds the plaintiffs are estopped from enforcing their claim.

Further, if the plaintiffs are entitled to succeed in the action, they cannot recover the full amount of their claim. The whole sum realized by the execution was obtained by the sale of all the goods on the premises, of which only about one-half belonged to the plaintiffs. After deduction of the sheriff's charges and other sums the defendant received 52*l.* 10*s.* 6*d.* in respect of her judgment debt. That sum, though nearly the same as the gross price obtained for the plaintiffs' own goods, does not represent the price of these goods only, but of all the goods sold. There should therefore be an apportionment of that sum as between the plaintiffs and the defendant.

Carthew in reply. The plaintiffs are entitled to recover

(1) (1880) 15 Ch. D. 96, 105. (2) (1839) 10 Ad. & E. 90, 98.

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the whole amount in the hands of the defendant, which represents the sum realized by the sale of their goods.

BAILHACHE J. This is an appeal by the plaintiffs from the judgment of the learned judge of the Clerkenwell County Court in an action in which they claim to recover from the defendant a certain sum as money had and received by her to their use. On March 19, 1921, the defendant, by whom certain premises were let to one Martelaere, obtained judgment against him for arrears of rent and a writ of fieri facias was afterwards issued thereon. The sheriff seized and eventually sold all the goods upon the premises including certain furniture of about half their total value which belonged to the plaintiffs and had been let by them to Martelaere on hire purchase. The sale realized 105*l.* 8*s.* 8*d.*, of which after deduction of the sheriff's charges and certain other sums 52*l.* 10*s.* was received by the defendant in respect of her judgment debt. The plaintiffs say that the sum received by the defendant represents the proceeds of the sale of their goods and not of the goods of the execution debtor, and that the defendant is liable to pay that sum to them as money had and received by her to their use.

To this claim the defendant sets up two main defences. First, she says that the plaintiffs are prevented by estoppel from maintaining the action. The estoppel is alleged to arise on these facts: The plaintiffs were informed by Martelaere of the seizure of the goods soon after it had taken place. Their manager then went to see the house and found it stripped of all the goods and the furniture gone. The plaintiffs made no further inquiry and gave no notice to the sheriff or to the defendant that certain of the goods seized were their property, which had been let by them to Martelaere on the hire system. They took no steps to stay the execution, which accordingly proceeded, the goods being sold by the sheriff and the proceeds of sale applied in making the payments already mentioned.

It is well settled that in order to create an estoppel there must be a duty owing by the person estopped towards another

person to speak or to act, which he has failed to perform, and damage must thereby have resulted to that other person. No one can rely upon the estoppel except the person to whom the duty was owing and who has suffered the damage. It is here said that the plaintiffs owed some duty to speak to the sheriff as the agent of the defendant or otherwise, and that the sheriff has been damaged by their neglect of that duty. It does not appear, however, that the plaintiffs were under any duty to tell the sheriff anything. It may perhaps be that if they had known beforehand that it was intended that the goods should be sold, they would have been under a duty to tell the sheriff that the goods were theirs and that they did not want them to be sold; but before they knew of the intended sale it had already taken place. Further, even if the plaintiffs were under a duty to make that statement to the sheriff, it cannot be said that the sheriff has been in any way damnified by their failure to make it. In the present case the plaintiffs' claim is not barred by the estoppel alleged, inasmuch as there was no duty to speak owing by the plaintiffs to the sheriff, and if there was, the sheriff has not been damaged by their silence. These considerations dispose of the main point relied upon by the defendant.

Another point taken on behalf of the defendant relates to the amount which the plaintiffs are entitled to recover in the action, and on this point it seems to me that the contention of the defendant is right. The plaintiffs' goods and the other goods upon the premises were of practically equal value. The sale of all the goods realized 105*l.* 8*s.* 8*d.*, of which about one-half, or upwards of 52*l.*, was attributable to the plaintiffs' goods. It is admitted that, after deduction of sheriff's charges and other payments, the defendant received a sum of 52*l.* 10*s.* 6*d.* in satisfaction of her judgment debt and costs. That sum, however, does not represent the proceeds of sale of the plaintiffs' specific goods only, but of the whole of the goods sold. It was the balance of the gross price of all the goods sold, which it so happened was almost exactly twice as great. That being so not more

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than about one-half of the 52*l.* 10*s.* received by the defendant can be recovered by the plaintiffs in respect of their goods, and there must therefore be an apportionment of that sum as between the plaintiffs and the defendant.

McCARDIE J. I am of the same opinion.

The goods seized by the sheriff at the house in question included certain goods of about one-half the total value, which were the property of the plaintiffs, being covered by the hire-purchase agreement between them and the judgment debtor. In April, 1921, the plaintiffs' agent, having been told that the goods had been seized, went to the house and found it stripped of all the goods including those of the plaintiffs. At that time he did not know how the goods had been taken or seized and he made no inquiry. Subsequently, in May, 1922, he did make inquiries, and he then found that the goods had been seized and sold by the sheriff under a writ of fieri facias and that the defendant had received a certain sum in respect of them. The plaintiffs bring this action to recover that sum from the defendant as money had and received by her to their use.

By the Bankruptcy and Deeds of Arrangement Act, 1913, s. 15, where goods in the possession of an execution debtor at the time of seizure by the sheriff are sold by the sheriff without any claim having been made to them, the purchaser of the goods so sold is protected, and the sheriff is protected also, unless in either case he had notice or might have found that the goods were not the property of the execution debtor. It is reasonably clear from the section that it is not intended to interfere with the right of the true owner of the goods to recover their value from the execution creditor at whose instance they have been seized.

There can be no doubt that in a case of this kind an action for money had and received is well founded: see Leake on Contracts, 3rd ed., p. 74.

It is said, however, on behalf of the defendant that the plaintiffs are prevented by estoppel from maintaining their

claim. Mr. Matthews submitted that the Court was bound to hold that there was a duty owing by the plaintiffs to the sheriff as the agent of the defendant to give notice of their claim, and that they are estopped by their disregard of that duty. In support of that view he cited two cases. The first of these was *Dean* v. *Whittaker*. (1) I have looked at that case with care, and I find that there the goods were not sold and the main question was as to the form of the action and its essential ingredients in the circumstances. Even if the dicta there expressed by Abbott C.J. are right, that case has no bearing upon the present. The other case was *Duffill* v. *Spottiswoode*. (2) In that case the facts were equally peculiar and the goods had not been sold. The observations there made by Best C.J. can only apply to the special circumstances with which he was dealing, and that case, like the former, has no bearing upon this.

On behalf of the defendant, however, reliance was also placed upon the broad principle of estoppel at common law, which covers not one but many particular states of facts. The principle is laid down in *Pickard* v. *Sears* (3), which is a most useful case. The facts there were as follows : The owner of certain machinery, which was in the actual possession of another person, for several months abstained from claiming it and so acted as to lead a third party to believe that it belonged to the person in whose possession it was and to act on that belief, and it was held that in these circumstances the owner was estopped from denying that the machinery belonged to the person in possession of it. The Court there referred to the person estopped as having by his words or conduct " wilfully " caused another to believe in a certain state of facts and to alter his position. That observation should, however, be read in the light of *Freeman* v. *Cooke* (4) and *Carr* v. *London and North Western Ry. Co.* (5), which show that the conduct of the party estopped need not be wilful. The principle of estoppel at common law is well

(1) 1 Car. & P. 347.
(2) 3 Car. & P. 435.
(3) 6 Ad. & E. 469.
(4) 2 Ex. 654.
(5) (1875) L. R. 10 C. P. 307.

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explained and illustrated by these three cases, and the facts of the present case fall far short of those which are required to bring a case within that principle. There was here no duty on the part of the plaintiffs to inform the sheriff of their rights. If there was, they did not abstain from informing him of their rights. There is no evidence of prejudice either to the sheriff or to the execution creditor by any conduct of the plaintiffs which could be complained of.

Coincident with the common law doctrine of estoppel there is an equitable doctrine, which is explained in several well-known cases. In *Ramsden* v. *Dyson* (1) Lord Cranworth L.C. made the following weighty observation: "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own." (2) In a case of that description the estoppel rests upon the particular basis of actual acquiescence. I think that that is the true ground of the decision in *De Bussche* v. *Alt*. (3) In that case Thesiger L.J., delivering the judgment of the Court of Appeal, said: "If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act." In *Willmott* v. *Barber* (4), Fry J., in stating the doctrine of acquiescence, forcibly observed that the acquiescence which will deprive a man of his legal rights must amount to dishonesty. The case of *Gregg* v. *Wells* (5) seems to me to have no bearing on this matter. In my judgment there was nothing here to enable the county court judge to find that the plaintiffs were estopped either at common law or in equity.

(1) L. R. 1 H. L. 129.
(2) Ibid. 140.
(3) (1878) 8 Ch. D. 286, 314.
(4) 15 Ch. D. 96, 105.
(5) 10 Ad. & E. 90.

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As to the other point I agree that there should be a fresh ascertainment of the precise amount which the plaintiffs are entitled to recover from the defendant.

Appeal allowed.

Solicitors for appellants : *Tudor & Rowe.*

Solicitors for respondent : *Routh, Stacey & Castle.*

J. R.

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March 19, 26.

[1923. K. 994.]

Rating—Objection to Valuation List—Consequent Alteration of Rate—Company winding up—Preferential Payment—When Rate "due and payable"—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 209, *sub-ss.* 1 (*a*), 5 *—Non-payment of Rate—Distress Warrant—Jurisdiction of Magistrate.*

When a person assessed in a valuation list gives notice of objection to the sum at which he is therein assessed, and the valuation list, and, consequently, the rate, are altered as a result of the objection, the rate does not become due and payable by such person until it has been so altered.

A petition to wind up a company having been presented, a scheme was sanctioned by the Court which provided (inter alia) for the payment in a certain way of rates due from the company :—

Held, that magistrates, on an application for a warrant of distress for non-payment of the rates, were entitled to consider the effect of the scheme as a defence to the application, although this could not have been set up on appeal against the rate, and that their duties were not merely ministerial.

FURTHER hearing before Greer J. of case adjourned from Manchester Assizes.

The facts and contentions are fully set out in the judgment.

Eastham K.C. and *R. W. Leach* for the plaintiffs.

Langdon K.C. and *E. Talbot* for the defendants.

1923. March 26. GREER J. In this action, which was tried before me at Manchester without pleadings, the plaintiffs claim an injunction restraining the defendants from taking

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any further proceedings by distress to recover the poor rate and the district rate, made and levied on April 6, 1921, and from putting into force or execution the distress levied in respect thereof upon the premises of the plaintiff company. The original action was against the overseers only, but by amendment made at the trial, after an adjournment to enable the defendant corporation to assent, I added the corporation as defendants, and amended the indorsement on the writ so as to enable the plaintiffs to claim an injunction against the defendant overseers in respect of the poor and borough rate, and against the corporation in respect of the general district rate. The plaintiffs based their claim for an injunction on the contention that by reason of certain matters that had transpired after the rate was made and levied, the defendants had lost their right to distrain, and the question I had to decide was whether anything had happened whereby the defendants had lost their right to distrain.

The facts proved or admitted, so far as material, are as follows: On April 6, 1921, the Stockport overseers duly made and published the poor rate for the financial year 1921–1922 in accordance with the valuation list then in force, and the defendant corporation on the same date made and published the general district rate based on the valuations appearing in the said valuation list. In the said rate the plaintiffs were rated by the overseers at 2298*l.* 19*s.* 7*d.* for the poor rate, and by the corporation at 1520*l.* 16*s.* 5*d.*, making in all 3819*l.* 16*s.* These rates were based on a rateable value of 4022*l.* As regards the poor rate, requests for payment were made by the overseers shortly after the publication of the rate, but the plaintiffs did not pay any portion of it, nor did they pay any portion of the general district rate. On January 10, 1922, the plaintiffs served notice of objection to the valuation list in so far as it concerned their property, and on March 2, 1922, the assessment committee, on hearing the objection, reduced the rateable value to 3644*l.*, and the poor rate, so far as it affected the plaintiffs, was amended by substituting the sum of 1913*l.* 3*s.* 10*d.* for the sum of 2298*l.* 19*s.* 7*d.*, and the district rate was amended by

substituting the sum of 1386*l.* 4*s.* 2*d.* for the sum of 1520*l.* 16*s.* 5*d.* The sum payable in respect of the two rates together then became 3299*l.* 8*s.* On March 23, 1922, a new demand note was served on the plaintiffs, demanding payment of the said sums. It was a joint demand note, signed by Mr. Harry Grundy, who occupied the two posts of borough treasurer and superintendent assistant overseer. No payment of the said sums, or either of them, or any part of them, has been made by the plaintiffs. On April 6, 1922, a new rate was made and published in respect of the year 1922–1923, but inasmuch as the previous rate had not been paid, and having regard to the proceedings to wind up hereinafter mentioned, no demand note was sent at any material time in respect of this last mentioned rate. On April 26, 1922, one of the creditors of the plaintiff company presented a petition to wind up the company in the Chancery Court of the County Palatine of Lancaster. On May 12, 1922, a meeting of creditors was held, at which the two defendants were represented, to consider certain suggestions with regard to the reconstruction of the plaintiff company and the settlement of its debts. At the said meeting a statement of liabilities was presented, in which the amount due to preferential creditors for rent, rates and taxes was stated at 4593*l.* 10*s.* 3*d.* This sum included the amount due for the amended poor and general district rates for 1921–1922, but did not include the new rates for 1922–1923, payment of which had not, up to then, been demanded. An outline of a scheme of arrangement was presented at the meeting, clause 5 of which provided that all debts which, on the liquidation of the company, would be entitled to any preference or priority in payment should to the extent of such preference or priority in so far as they should not have been paid, be paid in full by the company.

As will be seen presently, having regard to s. 209, sub-ss. 1 (*a*) and 5, of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69) (1), the debt for the 1921–1922 rates if due and payable

(1) Companies (Consolidation) Act, 1908, s. 209, sub-s. 1: "In a winding up there shall be paid in priority to all other debts—(*a*) All parochial or

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when originally made on April 26, 1921, would be outside the preferential debts provided for by this clause, but if it only became due and payable on or after March 2, 1922, when the plaintiffs' objection was sustained and the rate was amended, it would be a preferential debt within the said clause. A statement was made on behalf of the company at the said meeting to the effect that the plaintiffs' debt which had been included in the list of liabilities would be a preferential debt payable in full. No misrepresentation was made as to the clause it was intended to put into the scheme with reference to preferential debts, and in my judgment the statement made was merely a statement of the legal effect of the clause, which the defendants were just as much bound to know as the plaintiffs. This meeting was only a preliminary meeting, and after the necessary steps had been taken in the Chancery Court and the petition had been ordered to stand over generally, a meeting of the creditors was held on August 11, 1922, in order to obtain the necessary majority in support of the scheme, but the required majority was not obtained, and for the time being the scheme came to nothing. Meanwhile, on May 19, 1922, complaint was made before the magistrates of the non-payment of the said rates at the same time as complaints were made with reference to non-payment by a number of ratepayers of their rates, but no summons was taken out against the plaintiffs. On May 22, 1922, the petition was further adjourned. On July 14, 1922, the plaintiffs wrote to the borough treasurer pointing out that if the scheme went through they would be in a position to pay the rates owing for the year 1921–1922, and probably would be able to come to some satisfactory arrangement for payment of the current year's rates. In reliance on this statement and what had been said at the meeting of creditors referred to above, the defendants refrained from taking any further steps to enforce their claim by distress or otherwise.

other local rates due from the company at the date hereinafter mentioned, and having become due and payable within twelve months next before that date. . . . ."

Sub-s. 5: "The date hereinbefore in this section referred to is . . . . (*b*) . . . . the date of the commencement of the winding up."

Thereafter the plaintiffs, having failed to obtain the necessary majority for their original scheme, put forward another scheme on the same lines, and took proceedings to have the matter reconsidered at another meeting of the creditors duly convened under the provisions of the Companies Acts, and on November 3, 1922, the scheme was carried, subject to the sanction of the Court. On January 4, 1923, the Vice-Chancellor of the Palatine Court made an order sanctioning the withdrawal of the petition, and sanctioning the scheme of arrangement. Clause 8 of the said scheme read as follows: "The several persons firms and companies (other than fully secured creditors) to whom the above named company was indebted on May 9, 1922, whether in respect of loans or otherwise howsoever, are hereinafter referred to as 'the creditors' and shall be dealt with as follows: (*a*) All debts which on a liquidation of the company would be entitled to any preference or priority in payment shall to the extent of such preference or priority and in so far as they shall not have been paid be paid in full by the company."

On January 19, 1923, the defendants, notwithstanding that they were bound by the said scheme, took out a summons against the plaintiffs, which was dated back to May 19, 1922, the date of the complaint, to show cause why they should not be proceeded against in default of payment of the two rates dated April 6, 1921, which were stated to amount to the figures as amended in accordance with the assessment committee's decision. The plaintiffs did not appear on the hearing of the summons, and on January 22, 1923, the magistrates, on the application of the overseers, issued their warrant to the overseers to distrain for the amount of the said poor rate and the borough rate, and on January 29 the magistrates issued their warrant to the defendant corporation to distrain for the said district rate and the costs, and the defendants put in a distress accordingly.

The plaintiffs contended that the debts in respect of the said rates were not preferential debts within the meaning of clause 8 of the said scheme, but were ordinary debts in respect of

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which the defendants were only entitled to payment of half in cash and half in shares, and they were therefore not entitled to distrain, on the ground that the rates became due and payable more than twelve months before the winding up of the company—that is to say, on April 6, 1921. The defendants on the other hand contended (1.) that the rates in respect of which the distress was made became due and payable at the earliest when the rate was amended on or about March 2, 1922, pursuant to the decision of the assessment committee; (2.) that the plaintiffs were estopped from contending that the rates were not preferential debts; and (3.) that the matter was concluded by the decision of the magistrates in issuing the warrants.

The first point raised for the defence involves the interpretation and application of clause 8 of the approved scheme. I think the clause must be interpreted as if it incorporated s. 209, sub-ss. 1 (*a*) and 5, of the Companies (Consolidation) Act, 1908. (1) If this be done it becomes apparent that the effect of clause 8 is that all parochial or other rates which became due and payable within twelve months next before the date of the sanctioning of the scheme—that is to say, January 4, 1923—were to be paid in full. It is true that the clause says that all debts which on the liquidation of the company will be entitled to preference are to be paid in full, and that clause has to be applied when there has in fact been no liquidation of the company. A period has to be ascertained which is defined as twelve months before a winding-up order when no winding-up order has been made, but clause 8 of the scheme must be interpreted in relation to the facts as they were known to the Court and to all parties, and as they are recited in the scheme. There was a pending petition to which there was no answer, and on the date the scheme was sanctioned the petition was before the Court, and if the scheme had not been sanctioned there can be no doubt that a winding-up order would have been made. It seems to me, therefore, that the clause must be read as meaning that debts are to be paid in full which would

(1) Ante, p. 131.

have been preferential debts if the Court instead of sanctioning the scheme had made a winding-up order.

The next question to be decided is whether the poor rate in respect of which the warrant of distress was granted, and in respect of which the distress was levied, became due and payable on or about April 6, 1921, when the rate was originally made, or on or about March 2, 1922, when the valuation list was amended by the assessment committee and in consequence thereof the rate was amended by the overseers. It was decided in *Davis* v. *Burrell* (1) that a rate is due and payable as soon as it is made and published without any demand being made for payment, and it appears clear that before the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), and the Union Assessment Committee Act Amendment Act, 1864 (27 & 28 Vict. c. 39), the rate was due and payable notwithstanding the fact that notice of appeal had been served, but the ratepayer was protected from proceedings for any greater sum than the sum at which he was assessed before the rate appealed against was made: see s. 2 of the Poor Rate Act, 1801 (41 Geo. 3, c. 23). It is clear from this section that subject to the limitation mentioned in the proviso the rate continued due and payable notwithstanding the notice of appeal. Until the Union Assessment Committee Act Amendment Act, 1864, an appeal could be commenced and proceeded with without any objection before the assessment committee; indeed, until assessment committees were created by the Union Assessment Committee Act, 1862, no such body existed. This Act by s. 2 provided for the appointment of assessment committees for the preparation of valuation lists by the overseers and their deposit for inspection, the hearing of objections if made within twenty-eight days after notice of deposit (ss. 18 and 19), and the amendment of the valuation lists (s. 20), and contained a provision, in s. 28, that where a valuation list under the Act has been approved and delivered to the overseers, no rate for the relief of the poor or other rate which by law is required to be based on the poor rate shall be of any force

(1) (1851) 10 C. B. 821.

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except the hereditament included in the rate be rated according to the annual rateable value appearing in the valuation list in force in the parish. The Act of 1862 did not permit any objections to be made to the valuation list before the assessment committee after the expiration of twenty-eight days from receipt of notice of deposit, but by s. 1 of the Union Assessment Committee Act Amendment Act, 1864, it was provided that before any appeal could be heard against any rate the appellant should give twenty-one days' notice to the assessment committee, and that no person should be empowered to appeal against a poor rate made in conformity with the valuation list approved by the committee unless he should have given notice of objection against the said list and should have failed to obtain such relief as he deemed just. It empowered the committee to hear the objection and to call for and amend the list, although the same had been approved and no subsequent list transmitted to them. It further provided that if the committee amended the list they should give notice of such amendment to the overseers, who should thereupon alter the then current rate accordingly. The Act does not expressly say that the list as amended shall then be the list in force in the parish, but it seems to me necessary to apply to the amendment the words of s. 28 of the Act of 1862. It is impossible that two different lists could be in force in the parish, and I am of opinion that if the amendment has been made on an objection by a ratepayer who desires to appeal, the list as amended becomes the list then in force in the parish, and that in the interval between the amendment of the list by the committee and the amendment of the rate by the overseers there is no rate which is of any force, because the rate has ceased to be the rate according to the annual rateable value appearing in the valuation list in force. This appears to me to involve the proposition that the rate as made and levied ceases to be due and payable, and it is only by reason of the amendment of the rate that the ratepayer becomes liable to pay the amount of the amended rate. In my judgment the amount of the amended poor rate became due and payable when the overseers

amended the rate after the alteration by the assessment committee of the valuation list on March 2, 1922. It follows from this that it was a preferential debt entitled to payment in full, and if it was not paid in full the overseers had not lost their right to obtain a warrant from the justices to enforce their rights to payment of the rate in full.

I have discussed this first question as if the action was only concerned with the poor rate, but by amendment it is also concerned with the district rate. It follows from s. 222 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), that the same principles will apply to the district rate, and it is unnecessary to consider the additional argument put forward by Mr. Langdon for the corporation, which was to the effect that as regards district rates, by reason of the latter part of s. 222, the district rate did not become due until the date for payment was appointed, and the only appointment proved in this case, if any, was by the demand note, which was clearly within the protected period of twelve months.

As to the second contention raised by the defendants, strictly speaking, it is unnecessary for me to give any decision on it, but as the question of estoppel involves some questions of fact it seems desirable that I should express my view about it.

I think the plaintiffs by the document they put before the meeting of creditors held in May, 1922, and by the letter of July 14, 1922, did represent to the defendants that the amount due in respect of the 1921 rates would be a preferential debt payable in full under the scheme. I have no doubt that they thought so, but they put the scheme before the defendants; they did not misrepresent any fact as to what the contents of the scheme would be; they made no misrepresentation as to the date at which the rates had become due; and in my judgment the plaintiffs are not estopped from contending that the effect of the scheme is to exclude from the preferential payments the 1921 rates. I think the representation was a misrepresentation of a legal inference

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from facts known to both parties, and such a misrepresentation cannot in my judgment give rise to any estoppel.

On the defendants' contention that the magistrates' order issuing the warrant precluded the plaintiffs from contending that the distress was wrongful on the principle of estoppel by the judgment of a competent Court, a number of cases were cited at the hearing. The plaintiffs contended that the justices acted merely ministerially, and that they had no power to decide whether the defendants were precluded by the scheme from enforcing their right to the payment of the debt, but as the rate was good on the face of it they were bound to issue the warrant. It is quite true that there are expressions in some of the cases to the effect that the justices act ministerially: see for example *Reg.* v. *Handsley* (1) and *Reg.* v. *Sinclair* per Cave J. (2); but these expressions must be interpreted according to the subject matter of the cases, and it is undoubtedly the law that there are many objections which may be taken before the magistrates on an application to issue a warrant of distress which they are entitled to decide. They are for example entitled to inquire into and decide whether the respondent is the occupier of the premises in respect of which he is rated. They are also entitled to inquire whether the property is in the parish, and whether the rate is bad on the face of it: see per Wills J. in *Bates* v. *Plumstead Overseers* (3); and, semble, these are not the only questions into which magistrates can inquire: see the judgment of Lord Alverstone C.J. in *Westminster Corporation* v. *Army and Navy Auxiliary Co-operative Supply*. (4) They cannot, of course, inquire whether all the conditions precedent have been performed in order to make a valid rate if the rate is valid on the face of it: see *Shillito* v. *Hinchliffe* (5); but they may inquire into the question as to whether the respondent has been in occupation for the whole period of the rate, and then may decide what is the right proportion of the rate applicable to the period of time

(1) (1881) 7 Q. B. D. 398, 399.
(2) (1896) 60 J. P. 551.
(3) (1895) 64 L. J. (M. C.) 127, 129.
(4) [1902] 2 K. B. 125, 130.
(5) [1922] 2 K. B. 236.

during which he has been in occupation: see *Mansel* v. *Itchen Overseers.* (1)

It was contended by Mr. Eastham for the plaintiffs that as there was no appeal from the issue of a distress warrant the order of the justices could not be a judicial act, but must be merely ministerial, but it is quite clear that an appeal does lie from the decision of the justices. They sit as a Court of summary jurisdiction and they may state a case for the consideration of the High Court: see for example *Shillito* v. *Hinchliffe* (2) and *Mansel* v. *Itchen Overseers* (1) cited above, which are decisions on cases stated. *Reg.* v. *London Justices* (3) does not, as was contended, decide that no appeal lies against the decision of the magistrates on an application to issue a distress warrant. It only decides that by reason of the express words of the statute granting the right of appeal the appeal does not lie until after distress is levied.

The question I have to decide is one which is not precisely covered by any of the decided cases. Are the magistrates entitled and bound to consider an objection to the issue of a warrant which is based on matters which could not be raised by way of appeal against the rate, and which afford an answer to the claim for the amount of a rate which is good on the face of it and on the assumption that the rate was validly made and was when made in all respects binding on the ratepayer? After the rate is made, one of the methods whereby it may be enforced against a ratepayer is by summons to show cause why a distress warrant should not issue against him for the amount of the rate. It seems to me clear that he would be entitled to go before the magistrates and say "You cannot issue this warrant, the rate is no longer due from me, I have paid it," and the magistrates would have jurisdiction to decide whether or not it had been paid. I am also of opinion that the magistrates would have jurisdiction to say that the liability to pay the rate had been satisfied in some other way than by payment. Any other

(1) [1906] 1 K. B. 221. (2) [1922] 2 K. B. 236.
(3) [1899] 1 Q. B. 532.

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Greer J.

view would lead to the absurd and unjust result that execution might be sanctioned for the payment of a rate which though due at the time the rate was made and levied had since ceased to be due.

I accordingly hold that the plaintiffs could have raised before the magistrates the defence that the rate had ceased to be due by reason of the scheme which was binding on the defendants, and that the decision of the magistrates, though given in their absence, is binding on them in respect of all defences which they might have raised before the magistrates, and that they are precluded from contending in this action that the distress which was levied under the warrant granted by the magistrates was unlawful by reason of the provisions of the scheme, and in my judgment on this ground also they are disentitled to the relief which they claim. The result is that there must be judgment for the defendants with costs.

Judgment for defendants.

Solicitors for plaintiffs: *Hedley Norris & Co., for Vaudrey, Osborne & Mellor, Manchester.*

Solicitor for defendants: *Robert Hyde, Stockport.*

W. L. L. B.

S.S. ARILD (Owner) *v.* SOCIÉTÉ ANONYME DE NAVIGATION HOVRANI.

1923
April 17.

Shipping—Charterparty—Vessel off Hire while under Repair—Liability for Coal consumed while Vessel off Hire.

A time charterparty provided that the owner was to maintain the steamship in a thoroughly efficient state for and during the service; that the charterers were to provide and pay for all coal; and that in the event of loss of time through (inter alia) breakdown or other accident preventing the working of the steamer and lasting more than twenty-four consecutive hours the hire should cease until the vessel was again in an efficient state to resume her service.

During the currency of the charterparty the vessel was off hire for repairs, and while so off hire bunker coal to the value of 105*l.* 15*s.* was consumed :—

Held, that notwithstanding the fact that the vessel was off hire the charterers were bound to pay for the coal consumed during that period.

Giertsen v. *Turnbull & Co.* 1908 S. C. 1101 and dictum of Phillimore J. in *Vogemann* v. *Zanzibar Steamship Co.* (1901) 6 Com. Cas. 253, 255 followed.

Award in the form of a special case.

By a charterparty, headed "The Baltic and White Sea Conference Uniform Time Charter, 1912," and dated October 30, 1919, Moritz Vammind, the owner of the steamship *Arild*, let, and the Société Anonyme de Navigation Hovrani hired, the said steamship for six months, on the terms and conditions therein contained, those material for the purposes of this report being as follows :—

"2. That the owner shall provide and pay for all the provisions and wages, and for the insurance of the steamer, and for all deck and engine-room stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the service. . . . ."

"3. That the charterers shall provide and pay for all the coals, fuel, water for boilers, port charges, pilotages (whether compulsory or not), canal steersmen, boatage, lights, tug-assistance, consulages (except consular shipping and discharging fees of the captain, officers, engineers, firemen and crew), canal, dock and other dues and charges (also to pay

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all dock, harbour and tonnage dues at the port of delivery and redelivery unless incurred through cargo carried before delivery or after redelivery), agencies, commissions, expenses of loading, trimming, stowing, unloading, weighing, tallying and delivery of cargoes, surveys on hatches and protests (if relating to cargo), and all other charges and expenses whatsoever, except those above stated."

"4. That the charterers at the port of delivery and the owner at the port of redelivery shall take over and pay for all coal remaining in steamer's bunkers, at the current price of the respective ports."

"12. That in the event of loss of time from deficiency of men or owner's stores, breakdown of machinery, or damage to hull or other accident preventing the working of the steamer and lasting more than twenty-four consecutive hours, the hire shall cease from the commencement of such loss of time until she be again in an efficient state to resume her service. . . . ."

The charterparty further contained an arbitration clause.

During the currency of the charterparty it was found necessary to do certain repairs to the vessel, and while those repairs were being effected bunker coal of the value of 105*l.* 15*s.* was consumed. While the repairs were being executed the vessel was off hire.

Disputes having arisen between the owner and the charterers as to (inter alia) the liability to pay for the coal consumed by the vessel while she was off hire during the carrying out of the repairs, those disputes were referred to arbitration, and the umpire made an award finding (inter alia) that the coal consumed while the vessel was under repair was for charterers' account. The question was whether he was right in so holding.

Le Quesne for the charterers. The umpire was wrong in awarding that the coal consumed while the vessel was off hire was for charterers' account. Clause 3 of the charterparty, which requires the charterers to provide and pay for all coal,

must be read subject to the stipulation of clause 2, that the owner is to maintain the vessel in a thoroughly efficient state for and during the service, and also subject to clause 12, which says that the vessel is to be off hire in the event which in fact happened. The underlying condition on which the charterers' liability to pay for coal arises is that they are receiving the use of the ship, and it is clear that while she was off hire they were not receiving her use. By the award the charterers have to pay the owner for keeping the vessel in a condition so that she may fulfil the contract. That cannot be right. There is no English authority directly touching this point. There is an observation of Phillimore J. in *Vogemann* v. *Zanzibar Steamship Co.* (1) that in circumstances like these the charterers are liable for the coal consumed, but the observation was purely obiter. Phillimore J.'s decision was affirmed in the Court of Appeal (2), but nothing that was there said amounted to a decision upon the point. The Scottish case of *Giertsen* v. *Turnbull & Co.* (3) is a decision against the view now contended for, but that is not a binding authority, and it is submitted was wrongly decided.

[He also referred to *The Durham City.* (4)]

Sir Robert Aske for the owner. *Giertsen* v. *Turnbull & Co.* (3) and *Vogemann* v. *Zanzibar Steamship Co.* (5) clearly support the owner's contention that the charterers are liable to pay for the coal consumed while the vessel was off hire. The basis of the charterparty, which, it is to be observed, is a conference charterparty and therefore in the nature of a compromise between owners and charterers, is that the owner merely undertakes the provision of the vessel, payment of wages of the crew and certain other specified expenses, leaving all others for the charterers' account, and in particular, there is a definite obligation on the charterers to pay for coal.

(1) 6 Com. Cas. 253, 255.
(2) (1902) 7 Com. Cas. 254.
(3) 1908 S. C. 1101.
(4) (1889) 14 P. D. 85.
(5) 6 Com. Cas. 253; 7 Com. Cas. 254.

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McCARDIE J. The question is whether the charterers or the owner of the *Arild* are to bear the cost of certain coal consumed while the vessel was under repair and off hire. Mr. Le Quesne, on behalf of the charterers, submits that they are free from any obligation to pay for this coal by virtue of clause 12 of the charterparty. His argument concisely put comes to this, that when the vessel went off hire the charterers' liability to pay for coal ceased, because the coal was then used for the purposes of the owner and not for the purposes of the charterers. The point is of some importance, because this form of charterparty is widely used and there is no direct English authority dealing with it. In my view Mr. Le Quesne's contention cannot succeed. I think the charterers remained liable for the cost of the coal, although the vessel was off hire for more than twenty-four hours. The language of clause 3, that the charterers shall provide and pay for all coal, is very broad, and casts upon them, prima facie, a liability for the totality of the coal used during the whole period of the hire. I agree with Sir Robert Aske that that being the prima facie liability cast upon the charterers they cannot escape, unless they can point to some other clause which with reasonable clearness frees them from this burden. In my view upon the true construction of the charterparty the words of clause 12 are not adequate to achieve the end desired by Mr. Le Quesne. In that clause, which states that in certain events when the steamer is prevented working for more than twenty-four consecutive hours the hire shall cease, the word "hire" only is mentioned; no reference is made to coal or to any one of the other matters mentioned in clause 3. Clause 12 is quite inadequate to cut down the liability cast upon the charterers by clause 3. I think, too, that for practical reasons it is proper so to hold, because it is obvious that if clause 12 were to be applied to such a case as the present there would be very great difficulty in ascertaining the amount of coal properly attributable to, say, a period of thirty hours during which the steamer was prevented from working, and if one looks at clause 3 it is very

difficult to see how that clause with the many matters enumerated could be made practically to apply if the charterers' contention is right. I do not think that those who drafted this charterparty meant to provide in clause 12 for anything except the cesser of hire; if they had intended to provide for more nothing would have been easier than to do so.

I have dealt with the point apart from authority. As I have said, there is no direct English authority, but the point was definitely decided in Scotland in *Giertsen* v. *Turnbull & Co.* (1) on a charterparty which, as far as I can see, is in substance identical with that now before me. Lord Salvesen in giving judgment in that case clearly expressed the view which I have just stated as to the construction of the charterparty, and the Second Division of the Court of Session agreed with Lord Salvesen's opinion. The Scottish Court therefore took a view adverse to Mr. Le Quesne's contention. Although there is no English decision upon the matter there is a dictum which is equally adverse to the present charterers' contention. In *Vogemann* v. *Zanzibar Steamship Co.* (2) Phillimore J. expressed the opinion that in circumstances similar to those in this case the charterer was liable for the coal consumed while the ship was off hire. In the Court of Appeal the point was not expressly dealt with, but I am satisfied that that Court must have considered the dictum of Phillimore J., and, as far as I can see, acquiesced in it. I observe that *Giertsen* v. *Turnbull & Co.* (1) is cited in Scrutton on Charterparties, 10th ed., p. 383, and I think that a Court of first instance in this country should follow the express decision of the Court of Session in Scotland in such a case as this, where the question is not one peculiar to a form of document used in Scotland only, but relates to a document in common use in several countries. It is most desirable that there should be uniformity of decision as to the construction of a document so widely used. For these reasons I am satisfied that the charterers must pay for the coal, and I only desire to add that Butt J.'s decision in

(1) 1908 S. C. 1101. (2) 6 Com. Cas. 253, 255.

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The Durham City (1) in no way conflicts with the view I have expressed, but, on the contrary, seems to support it. The award therefore stands.

Award upheld.

Solicitors for charterers: *Downing, Middleton & Lewis.*
Solicitors for owner: *Botterell & Roche.*

J. S. H.

1922
Dec. 19.

PERFORMING RIGHT SOCIETY, LIMITED *v.* CIRYL THEATRICAL SYNDICATE, LIMITED AND ANOTHER. (2)

[1921. P. 3201.]

Copyright—Musical Work—Infringement—Performance by Orchestra at Theatre—Liability of Lessee of Theatre—Liability of Licensee of Theatre and Producer of Play—Infringement of Right to "authorise" Performance—Infringement by Person who "permits" Theatre to be used for Performance—Copyright Act, 1911 (1 & 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 2; *s.* 2, *sub-ss.* 1, 3—*Payment into Court—Costs.*

The plaintiffs were the proprietors of the right of performing in public certain musical works. The defendant company were the lessees of a theatre, and the second defendant was their managing director. The defendant company by the second defendant as their agent appointed for remuneration an orchestra to supply music during the performances at the theatre. Under an agreement between the defendant company and the second defendant, the former granted to the latter a licence of the theatre for a term and undertook to provide everything necessary in front of the curtain for a play to be run by the latter, who was to provide every requisite behind the curtain, the takings to be shared between them. The orchestra was engaged for the performances of the play, and the second defendant had power to prevent them from giving any particular piece of music. At a performance of the play the orchestra gave the above-mentioned musical works without the leave of the plaintiffs. The plaintiffs brought an action against both the defendants for an injunction and damages for infringement of their copyright:—

Held, that, not only the defendant company, but also the second defendant by reason of his control over the orchestra, and notwithstanding that he was only the agent of the defendant company in employing the orchestra, and that the orchestra were not his agents, had assumed to "authorise" the performance of the said musical works

(1) 14 P. D. 85.
(2) The decision reported below has since been reversed in the Court of Appeal.

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within the meaning of s. 1, sub-s. 2, of the Copyright Act, 1911; that the plaintiffs' copyright had thus been infringed by both defendants under s. 2, sub-s. 1, of that Act; and that the plaintiffs were entitled to the relief claimed against both defendants.

Held, also, that although the defendants had paid into Court a sum equal to the damages recovered in the action, the plaintiffs were in the circumstances entitled to costs.

ACTION tried by Rowlatt J. without a jury.

The Performing Right Society, Ld., were the proprietors of the copyright of performing in public many musical works and among them a selection known as "Mary" and a march known as "Colonel Bogey."

The Ciryl Theatrical Syndicate, Ld., were in and since 1918 the lessees of the Duke of York's Theatre, St. Martin's Lane, London, and Mr. Philip Michael Faraday was a shareholder in and the managing director of the said company.

When the company became lessees of the theatre, an oral agreement was entered into between Mr. Faraday on their behalf and one Bobbe, a professional musician, that the latter should provide an orchestra under his management and direction to perform at the theatre at an inclusive salary of 30*l.* per week.

By an agreement in writing made on June 8, 1921, between the said company and Faraday, therein called "the licensee," which recited that the licensee was desirous of giving at the theatre performances of a play entitled "The Wrong Number," it was agreed (inter alia) that the company should provide the theatre and the dressing rooms in the rear together with the necessary machinery and fixtures for that purpose; that the licensee should provide and run the play with a full and competent company of artists and stage hands, all scenery dresses and properties, and every requisite behind the curtain save as aforesaid; that the company should provide and pay an efficient quartette orchestra; that the licensee should produce the play on June 16, 1921; that all moneys paid for admission to the theatre, except for proprietary seats, should be received by the company and after deduction of entertainment tax and certain commissions

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the takings should be shared between the company and the licensee as follows: On the takings in each week up to 1200*l.* the company should have 45 per cent. and the licensee 55 per cent., on the excess in each week over 1200*l.* but not exceeding 1500*l.* the company should have 40 per cent. and the licensee 60 per cent., and on the excess in each week over 1500*l.* the company should have 35 per cent. and the licensee 65 per cent.; and that the licensee should continue the run of the play up to the termination of the licence or until notice as thereby provided.

Pursuant to the latter agreement the licensee produced and ran the play at the theatre. At the top of the programme of the play appeared the words "Mr. Michael Faraday presents" the play. A representative of the company and Faraday verbally engaged Bobbe to provide the orchestra and supply the music for the play, and he did so accordingly. At each performance during the intervals between certain parts of the play the orchestra gave musical selections.

During a performance of the play given at the theatre on July 14, 1921, the orchestra played among other pieces a part of the above-mentioned "Mary" selection without having obtained the consent of the Performing Right Society, Ld. On behalf of the society a letter was sent to the defendant Faraday asking for an undertaking that the infringement should not be repeated, but owing to his being absent from London that letter was not answered. During a performance of the play at the theatre on July 27, 1921, the orchestra with the approval of the defendants' representative played certain pieces, including both the "Mary" selection and the "Colonel Bogey" march, without the consent aforesaid. On July 28, 1921, a letter was sent on behalf of the society to the defendant Faraday informing him that these two pieces had been played. He wrote in reply to the effect that he had engaged an orchestra who provided their own music, that if they were infringing any copyright the owner thereof must look to them and not to him, that it made no difference to him what the orchestra played and indeed that he was seriously thinking of doing without an orchestra,

and that it was not he but the company that was running the theatre.

On November 15, 1921, the Performing Right Society, Ld., brought the present action against the said company and Faraday. The plaintiffs in their statement of claim alleged (inter alia) that on July 27, 1921, the defendants or one or other of them infringed the plaintiffs' copyright by performing in public at the theatre the said works, and/or by authorizing the performance in public thereof without the consent of the plaintiffs; that in the alternative the defendants or one or other of them infringed the said copyright by permitting the said theatre to be used for the said performance for their private profit without the consent of the plaintiffs; and that unless restrained by the Court the defendants intended to repeat the said offences; and the plaintiffs claimed (1.) an injunction to restrain the defendants from infringing the plaintiffs' copyright by performing in public the said two musical works or any other work of the plaintiffs' without leave of the plaintiffs; (2.) an injunction to restrain the defendants from permitting the theatre or any other place of entertainment to be used for the performance in public of the said works without leave of the plaintiffs; and (3.) damages for infringement of the plaintiffs' copyright by unauthorized performance of the said works.

The defendants in their defence said (inter alia) (para. 1) that at all material times the defendant company were merely lessees of the said theatre; that the defendant Faraday was not otherwise interested in the premises except as a director of and shareholder in the defendant company, and that he did not as such director or otherwise do any of the acts and was not party to any of the matters complained of; (para. 2) that the defendants denied that they or either of them performed or authorized the performance of the said musical works or either of them; (para. 3) that they admitted that the said works were on the date alleged performed at the theatre; that the performance was by the orchestra under the management and direction of the said Bobbe, with whom the defendant company had the said contract; that at the

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time of entering into that contract it was orally agreed by Bobbe that the orchestra would not perform any copyright musical work without the consent of the owner of the copyright therein, or otherwise infringe any right of the owner; (para. 4) that neither of the defendants permitted the theatre to be used for the performance for their or his private profit or at all; (para. 5) that the defendants whilst denying liability brought 10*l.* 10*s.* into Court; (para. 6) that neither of the defendants had the intention of infringing the plaintiffs' alleged right in the said or any works; that if they or either of them had been guilty of the infringement alleged it was without their desire or knowledge and against their wish; that on becoming aware of the infringement the defendant company dismissed the orchestra on or about August 24, 1921; and that, subsequently, on or about September 3, 1921, the defendant company re-engaged the orchestra on the specific oral agreement that they would not perform the said works or any of them, and that that agreement had been fully observed by the orchestra.

On December 19, 1922, the action was tried by Rowlatt J. without a jury. Evidence was given on behalf of the defendants in support of the statements in their defence by the defendant Faraday, Mr. J. Bobbe, and others. The defendant Faraday stated that when the company became lessees of the theatre he on their behalf made the oral agreement with Bobbe as leader of the orchestra, and told him that he was not to infringe any copyright; that he (Faraday) was the presenter of and financially interested in the said play; that the orchestra did not form any part of the play or of the entertainment provided by the defendants; that though it was customary for an orchestra to play during the intervals of a theatrical performance, it was immaterial and did not contribute to the success of the performance; that the orchestra played in pursuance of the said oral agreement with him on behalf of the company, and if they had played any music which was copyright or inappropriate to the play he could have prevented them from continuing to do so; that he was not aware of any intention to play

the two pieces in question and did not authorize their performance; and that he on behalf of the company dismissed the orchestra for playing the said pieces but afterwards reappointed it.

The Hon. S. O. Henn Collins for the plaintiffs. Both the defendant company and the defendant Faraday infringed the plaintiffs' copyright in the musical pieces in question.

The plaintiffs having the copyright in these pieces, including the right to "authorize" the performance thereof within the meaning of s. 1, sub-s. 2 (1), of the Copyright Act, 1911, their copyright was infringed by both the defendants within s. 2, sub-s. 1 (1), of the Act, inasmuch as the defendant company by the second defendant as their agent, and the second defendant by himself personally, assumed to exercise the right to authorize the performance of the pieces by allowing their agents the orchestra to play the pieces without the consent of the plaintiffs: *Fenning Film Service, Ld.* v. *Wolverhampton, Walsall and District Cinemas, Ld.* (2) Even if the leader of the orchestra was not the agent of the defendants but was an independent contractor engaging his own performers and selecting his own music, the defendants nevertheless by their own admission had control of him and could prevent the orchestra from playing any particular

(1) The Copyright Act, 1911, provides:—

Sect. 1: "(2.) For the purposes o this Act, 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and shall include the sole right,—

. . . . . .

to authorise any such acts as aforesaid."

. . . . . .

Sect. 2: "(1.) Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright: . . . .

"(3.) Copyright in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright."

(2) [1914] 3 K. B. 1171.

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piece, and they are therefore responsible for the infringements complained of: *Performing Right Society* v. *Bradford Corporation* (1); *Marsh* v. *Conquest* (2); and *Monaghan* v. *Taylor*. (3) Under the contract between the defendants, the defendant Faraday shared in the financial benefit resulting from the performances as a whole, and he ought, therefore, to be held responsible at least in part for the playing by the orchestra of the said pieces notwithstanding that it took place in front of the curtain.

Further, both the defendants infringed the plaintiffs' copyright in these pieces within s. 2, sub-s. 3, inasmuch as the defendant company, being the lessees of the said theatre, and the second defendant, being the licensee, each of them did for private profit "permit" it to be used for the performance in public of the said pieces without the consent of the plaintiffs.

E. F. Spence for the defendants. Neither of the defendants is responsible for any infringement of the plaintiffs' copyright in the said pieces.

The plaintiffs' copyright in the pieces was not infringed under s. 2, sub-s. 1, of the Act of 1911 (4) by either of the defendants assuming to exercise the plaintiffs' right to "authorise" the performance of the pieces within the meaning of s. 1, sub-s. 2. (4) The defendant company did not authorize the performance of these pieces by the orchestra. Under the agreement between the defendant company and Bobbe, the former engaged the latter to provide an orchestra not as their agent, but as an independent contractor having complete control over the orchestra and power to direct them to play whatever pieces he might choose: see *Marsh* v. *Conquest* (2) and *Monaghan* v. *Taylor*. (3) It was an express term of that agreement that the orchestra should not infringe the copyright in any work. Neither did the defendant Faraday "authorise" the performance of the pieces by the orchestra. He was only the managing director and

(1) (1921) Copyright Cases (Macgillivray), vol. 1917-1921, p. 309.
(2) (1864) 17 C. B. (N. S.) 418.
(3) (1886) 2 Times L. R. 685.
(4) See note (1) ante, p. 151.

representative of the defendant company, and whatever he did was done by him as their agent. Under the contract between the defendants, the defendant Faraday's agency was restricted to what was done behind the curtain, and therefore he was not responsible for the orchestra which played in front of the curtain. The defendant Faraday had no power to authorize the orchestra to do anything, as they were not his agents.

Further, the defendants did not for their private profit "permit" the theatre to be used for the performance in public of the said pieces within s. 2, sub-s. 3. (1) The only person who can "permit" a theatre to be used for any purpose is the proprietor granting his permission directly or through an agent. Even if the term be applicable to the defendant company as lessees of the theatre, it cannot apply to the defendant Faraday, who was merely a licensee having no power to prevent the performance of the orchestra. In order that a person may permit an act to be done he must know beforehand that it is intended to do it: *Somerset* v. *Wade* (2); but here neither of the defendants had any previous knowledge that the orchestra was going to perform the pieces in question. A person cannot permit an act to be done unless he has control over those by whom it is to be done; and here the defendants had not control of the orchestra.

The plaintiffs are not entitled to an injunction against the defendants. Before they can obtain an injunction they must show not only that the defendants infringed their copyright, but that they have the intention of doing so again: *Proctor* v. *Bayley*. (3) Here the defendants have not and never had an intention of infringing the plaintiffs' copyright. When the defendants discovered that an infringement had taken place they dismissed the orchestra, and they paid a sum into Court to answer any damage that the plaintiffs might have suffered. The grant of an injunction would make it difficult for the defendants to enter into other agreements and would interfere with their business.

(1) See note (1) ante, p. 151. (2) [1894] 1 Q. B. 574.
(3) (1889) 42 Ch. D. 390.

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The Hon. S. O. Henn Collins in reply. A plaintiff whose copyright is infringed has a right to an injunction notwithstanding that the infringer offers to avoid infringing again and to pay damages: *Savory, Ld.* v. *World of Golf, Ld.* (1)

ROWLATT J. Sect. 1, sub-s. 2, of the Copyright Act, 1911, enumerates for the purposes of the Act the particular rights which are included in the word "copyright" as applied to a literary or musical work, and one of these rights is the sole right to "authorise" the production, reproduction, or performance of the work. It is thus clear that one of the rights of the proprietor of the copyright in a work which is protected by the Act is the mere right to authorize the performance of the work.

Further, it seems to me that the word "authorise" as there used does not mean exclusively the giving of power to an agent to do the act. When one person authorizes another to do an act as his agent, the act when done by the latter is the act of the former. A person may, however, authorize another to do an act without making him an agent, and in that case the latter does the act on his own account and not as agent. If, for example, the owner of a field gives a man leave to cross it, the man crosses it not as agent of the owner but as his licensee. I think the word "authorise" as there used includes cases such as that, and resembles the word "permit."

Moreover, I do not think that the word "authorise" has any relation to the character in which the person giving the authority acts. I think that a person "authorises" another to do an act within the meaning of the enactment although he may only be intervening as an agent for somebody else.

Sect. 2, sub-s. 1, of the Act deals with infringement of copyright, and it provides that copyright shall be infringed by a person who without the consent of the owner does any of the acts the sole right to do which is conferred upon the owner of the copyright. That provision thus makes it an infringement to "authorise" within the meaning of the statute

(1) [1914] 2 Ch. 566.

any act the right to do which is conferred upon the owner of the copyright.

In the present case the facts are as follows: [His Lordship, after referring particularly to the contract between the defendant company and the defendant Faraday for the production of the play, and the agreement with and subsequent directions given to Bobbe, and observing that he did not attach much importance to the statement in the programme that the defendant Faraday "presented" the play, continued as follows:] During the run of the play the infringements complained of were committed. On July 27, 1921, the orchestra played both the pieces in question.

There can, I think, be no doubt that the defendant company are liable under s. 2 of the Act for the infringement of the plaintiffs' copyright which was thus committed.

It has, however, been strongly urged that the defendant Faraday is not responsible. It is true that Mr. Bobbe was not the servant or agent of Mr. Faraday. But if the latter, supposing he had known that it was intended to perform a particular piece, had told Mr. Bobbe that he objected to its being performed on the ground that it was copyright, or that it was inappropriate to the play, or on some other reasonable ground, I have no doubt that his objection would have prevailed with Mr. Bobbe. That is the clear inference which I draw from the facts proved, including the fact that Mr. Faraday dismissed Mr. Bobbe for having performed these pieces. Even if it was only as managing director of the defendant company that Mr. Faraday could allow or disallow the performance of pieces by the orchestra, it is clear that he was in a position to have prevented it from taking place. That being so, he could "authorise" it within the meaning of the Act, because, as I have already said, that term is not prevented from applying to a person's conduct by reason of the fact that he is in the position of an agent. In his reply to the letter of July 28, 1921, informing him that the orchestra had played the pieces in question, Mr. Faraday took up the attitude that he had engaged an orchestra who provided their own music, that

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Rowlatt J.

if they were infringing the copyright of any work, the proprietor must look to them and not to him, and that he did not care in the least what they played. Even if Mr. Faraday did not care in the least what the orchestra played, I think that on the principle stated in the judgment of Lord Coleridge C.J. in *Monaghan* v. *Taylor* (1), he is clearly responsible under the present Act, as he would have been under the former Act, for their having played music which was an infringement of copyright, because it was within his power to have prevented them from playing music of that description. I further think, however, that there is ample evidence to show that Mr. Faraday empowered the orchestra to play these pieces. I am satisfied that he did "authorise" the performance of these pieces within the meaning of the Act.

In my opinion the plaintiffs are entitled to relief against the defendant Faraday as well as against the defendant company. I think that in the circumstances they are entitled to an injunction against the defendants. I also think that they are entitled to damages, but that the 10*l.* 10*s.* paid into Court is sufficient and that I ought not to mulct the defendants in more.

As regards costs, the plaintiffs are entitled to costs in respect of their claim for an injunction. Even apart from the injunction, however, I should not disallow them costs. It seems to me that in this case the plaintiffs are not bound to treat the sum paid into Court as finally disposing of their cause of action. I think they were entitled to come into Court to have their rights pronounced upon. Formerly the rule was that even where the sum paid into Court by the defendant was sufficient, the plaintiff was entitled to the costs of proving the defendant's liability. That rule has no doubt been modified, but where the Court deems it proper that the plaintiff, instead of at once taking the money out of Court, should bring the matter into Court for determination of the question of liability, it still has a discretion to say that the plaintiffs should have their costs. In the exercise of this discretion I should have given the plaintiffs their costs even

(1) 2 Times L. R. 685.

if damages had been the only issue in this case. The plaintiffs were justified in coming into Court in order to have their position determined, more especially as the second defendant was taking rather too loose a view of his obligations and responsibilities.

There will be judgment for the plaintiffs against both defendants for an injunction and for damages, which I assess at 10*l.* 10*s.*, the sum paid into Court, with liberty to the plaintiffs to take that sum out of Court, and with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Syrett & Sons.*
Solicitors for defendants: *Macdonald & Stacey.*

J. R.

[IN THE COURT OF APPEAL.]

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Revenue—Legacy Duty—Estate Duty—English Estate—American Estate—Settlement of American Estate—Trust to pay Death Duties on English Estate—Portion of American Estate applied to payment of English Death Duties—Liability to Duty—Revenue Act, 1845 (8 *&* 9 *Vict. c.* 76), *s.* 4—*Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2, 22.

A testator who was domiciled in England had property situated in the United Kingdom and also in America. In 1916 he settled his American property upon certain trusts for his issue. The settlement provided that the settlor might with the consent of the trustees revoke it and appoint the property for the benefit of himself or any of his children. By a supplemental deed he revoked the settlement in part and appointed and declared that after his death the trustees should (inter alia) out of the trust fund raise and pay to the executors of his English will the amounts paid by the executors for any English death duties payable on his death and directed by the will to be paid by the executors. In 1917 he made an English will, expressly providing that it was not thereby intended to dispose of any of his American property, and he directed that all English death duties payable on or by reason of his death should be paid by his executors out of moneys made available and applicable in that behalf by the American settlement and the supplemental deed.

Upon the death of the testator, in 1919, the Attorney-General filed an information claiming a declaration that such part of the American trust fund as was required for the payment of the English death duties

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formed part of the residuary estate of the testator and was liable to estate duty and legacy duty:—

Held, that the property in question passed on the death of the testator under s. 1 of the Finance Act, 1894, but being situate out of the United Kingdom, by s. 2, sub-s. 2, it was only liable to estate duty "if under the law in force before the passing of the Act legacy duty was payable in respect thereof or would be payable but for the relationship of the person to whom it passes." Under s. 4 of the Revenue Act, 1845, "every gift by any will or testamentary instrument of any person, which by virtue of any such will or testamentary instrument is or shall be payable, or shall have effect or be satisfied out of the personal or moveable estate or effects of such person, or out of any personal or moveable estate or effects which such person hath had or shall have had power to dispose of" shall be chargeable with legacy duty. In this case none of the conditions mentioned in that sub-section were fulfilled and legacy duty was therefore not payable; and consequently estate duty also was not payable.

Decision of Sankey J. [1922] 2 K. B. 651 affirmed.

APPEAL from the decision of Sankey J. upon an information by the Attorney-General on behalf of the Crown (1), where the information is set out in full.

The question on the appeal was whether legacy and estate duty were payable upon a portion of certain property comprised in an American settlement executed by the testator, Lord Astor. The settlement contained a power of revocation, and by a supplemental deed the grantor revoked the settlement in part, and appointed that after his death the trustees should out of the capital of the American trust fund raise and pay to the executors of his English will the amount paid by them for any English death duties payable on his death and directed by his English will to be paid by the executors of that will. The testator in 1917 made an English will which expressly provided that it was not intended to dispose of any of his American property, and he directed that the English duties payable on his death should be paid out of moneys raised for that purpose from the American settlement. The Attorney-General filed an information claiming a declaration that such portion of the American trust fund as was required for payment of the English death duties formed part of the residuary estate of the testator and was liable to estate and legacy duty.

(1) [1922] 2 K. B. 651.

Sankey J. held upon the construction of s. 4 of the Revenue Act, 1845, and ss. 1, 2 and 22 of the Finance Act, 1894, that neither duty was payable. The Crown appealed.

Sir Douglas Hogg A.-G., *Sir E. Pollock K.C.* and *Sheldon* for the Crown.

Tomlin K.C. and *Harman* for the respondents.

[The arguments used in the Court below were repeated. *Lethbridge* v. *Attorney-General* (1) was also cited.]

1923. March 5. LORD STERNDALE M.R. I think this appeal must be dismissed.

In order to make this property chargeable it must be property passing on the death either under s. 1 or under s. 2, sub-s. 1 (*a*), of the Finance Act, 1894. I think that it does pass under s. 1. "Property" in that section is property which, to use Lord Macnaghten's words in *Earl Cowley* v. *Inland Revenue Commissioners* (2), "changed hands on the death," and that expression applies to the whole fund in the American settlement, not only this portion with which we are dealing but the whole of that fund. If that is so, then as property passing on the death which is situate out of the United Kingdom it comes under s. 2, sub-s. 2, and is only included in property passing "if under the law in force before the passing of this Act legacy duty"—we have nothing to do with succession duty here—"is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes."

As I think it passes under s. 1 it is not really relevant to consider whether it passes under s. 2, sub-s. 1 (*a*), but as the point has been argued, and was really the main point relied upon in the first instance, I think it right to say that in my opinion it does not pass under s. 2, sub-s. 1 (*a*), at all. Under s. 2, sub-s. 1 (*a*), the property which passes is "property of which the deceased was at the time of his death competent to dispose." In my opinion he was not competent to dispose of the property, for two reasons.

(1) [1907] A. C. 19. (2) [1899] A. C. 198, 211.

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In the first place I doubt very much whether he could dispose of it at all—whether he had any power over it. He had no power to dispose of this fund, which is used to pay estate duties and death duties, except in this sense that, by a direction to some other persons in his will, that is, to his executors, he could determine the object to which the fund was to be applied. But as soon as ever he had given his direction to his executors to pay death duties, automatically the duty of the trustees arose to supply the sum, or the amount of the sum—I do not think that it makes any difference—to the executors for the purpose of discharging the liability in respect of the death duties. I doubt very much whether he had any power or competency of disposition at all. But if he had, certainly in my opinion it was not such a competency of disposition as is contemplated by this section. I think, without using words that may seem to be wrong, such as "general or limited powers," similar to those used in other cases, it must be in my opinion a power which makes him competent to dispose of it in some sort of way at his own will, and not a power which makes him competent to dispose of it in one way and in one way alone. That is not such a disposition as, in my opinion, is contemplated by this section.

Under s. 2, sub-s. 2, the property is only chargeable with estate duty if it is chargeable with legacy duty, and if it is chargeable with legacy duty it seems to me upon the argument before us that it must be so chargeable under s. 4 of the Revenue Act of 1845. And in order to come within that section it must fulfil several conditions, which will be apparent when the section is read.

The section says: "Every gift by any will or testamentary instrument of any person, which by virtue of any such will or testamentary instrument is or shall be payable, or shall have effect or be satisfied out of the personal or moveable estate or effects of such person, or out of any personal or moveable estate or effects which such person hath had or shall have had power to dispose of" shall be chargeable with legacy duty.

It does not seem to me that this disposition, or whatever it is called, satisfies any one of those conditions. To begin with, it is not a gift by will or testamentary instrument. It is a gift, if it can be called a gift, or a disposition under or by virtue of the terms of the settlement. It is quite true that the terms of the will give a direction in which way the duty of the trustees of the settlement has to be fulfilled, but the will or testamentary instrument does not make any gift of this fund at all.

Then again it seems to me that it does not satisfy the second condition. Of course if it does not satisfy the first there is an end of it; but it does not satisfy the second even if it satisfied the first. It is not a gift out of the personal or moveable estate or effects of the testator at all. The property did not belong to the testator; it belonged to the trustees, and it never became the property of the testator, nor in my opinion did it ever become part of his estate. It is true that by the payment of duties out of that fund which passed under the settlement the gifts which are made by the will are increased in amount, but that does not make those gifts gifts out of anything but the English testator's estate; and it does not make the gift, if it be a gift, of this fund a gift out of the personal or moveable estate or effects of the testator. In my opinion it does not come under the third condition either. It is not "out of any personal or moveable estate or effects which such person hath had or shall have had power to dispose of." I need not repeat what I said with regard to the meaning of the words "power to dispose of." I think "power to dispose of" in that section is the same power that is contemplated by the words "competent to dispose of" in the section of the Act of 1894 to which I have already referred. This power, if any power existed, is not such a power in my opinion. That seems to be the view taken in Hanson on Death Duties, and I think it is a correct view.

The Attorney-General argued that the testator had power to dispose of it in an indirect way. It was said he could leave it to any individual he liked; and this was the way it

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was put. The Attorney-General said when the death duties were paid, amounting say to 1000*l.*—as a matter of fact it would be a great deal more—when that 1000*l.* was paid then the testator, as a matter of fact, had an extra 1000*l.* that he could leave to any one he liked. That, said the Attorney-General, is disposing of the fund that was in the American settlement. In my opinion it is doing nothing of the sort. The fund that is in the American settlement discharges some liabilities, and that discharge of the liabilities gives the testator an opportunity which he had not before of making another gift; but that is not disposing by will of the fund that comes from the American settlement.

I think this appeal fails in every way, and should be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The Crown in this case claim estate duty and legacy duty on a fund settled by an American settlement executed by the testator of property wholly in America. The fund in question and the trusts of it are described in these terms in the American settlement: "The trustees shall, out of the capital, raise and pay"—I am reading it shortly—"to the executors or trustees of the English will of the grantor"—that is, of the deceased testator—"the amounts of all sums which may be payable or may have been paid by the executors or trustees for any English death duties payable on or by reason of the death of the grantor upon or in respect of any property whatsoever and wheresoever and to whomsoever belonging, and directed by his English will or any codicil thereto to be paid by the executors or trustees of such will or for any interest or expenses." Now that is the fund in respect of which the Crown claim estate duty and legacy duty on the death of Lord Astor, the creator of that trust.

The Attorney-General in the first place relies upon s. 1 of the Finance Act, 1894, and he says that this fund, and in fact the whole of the funds settled by the American settlement, pass on the death of Lord Astor. I rather think they do, and I will assume for the purposes of this judgment that they do

so pass. If so, the fund now in question would of course be subject to estate duty in this country, because it passes on the death. But it is exempt from the estate duty by reason of s. 2, sub-s. 2, of the same Act, which provides that "property passing on the death of the deceased when situate out of the United Kingdom shall be included only, if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes."

I will come back to that presently, but at present I wish to deal with both contentions put forward by the Attorney-General under the Finance Act, 1894. The alternative contention under that Act was that if it did not become chargeable under s. 1, then it became chargeable under s. 2, sub-s. 1 (*a*), as being "property of which the deceased was at the time of his death competent to dispose." But in my opinion the deceased was not at the time of his death competent to dispose of this property at all. It was disposed of absolutely by the settlement and by the trusts of the settlement. It is quite true that when the trustees of the settlement are called upon to pay the money over they have to ascertain whether the duties are payable or have been paid by the executors, and also whether the testator has directed his executors to pay them. But that is only the condition attached to the payment of the money, and the description of the money which the trustees have to pay. It does not confer upon the testator any power of disposition. At the most it is only a power to dispose in some particular way, though it is not even that in my opinion; but if it were such a power as that it would still be not property of which the testator was competent to dispose within the meaning of the Finance Act, 1894.

So far with regard to the Act of 1894. The question that remains to be determined is whether the property becomes chargeable under s. 2, sub-s. 2, notwithstanding that it is situate out of the United Kingdom by reason of its being, by law in force before the passing of this Act, property in respect of which legacy or succession duty would be payable.

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Succession duty, of course, is out of the question; it is legacy duty if anything.

Well, now I turn to the only statutory provision which is relied upon as establishing that this fund is subject to legacy duty, or would have been but for the passing of the Act of 1894. That is the Revenue Act of 1845, s. 4, which defines what are to be treated as legacies within the meaning of the Legacy Duty Acts. I need not read the words again; they have been read by the Master of the Rolls, and many times in the course of the argument. But what I do say with regard to them is this. In the first place this is not a gift by will. The provision under which this fund becomes applicable for the estate duties or death duties payable here is not any direction in the testator's will, but it is the trust contained in the American settlement. That, of course, is enough of itself to dispose of the case for the Crown. But even if that is wrong, the section goes on to include property "which by virtue of such will is or shall be payable or shall have effect or be satisfied out of the personal or moveable estate of the testator." But this fund is not part of the personal or moveable estate of the testator. It was not payable to the executors virtute officii. The testator had no interest in it in his lifetime, and it does not fulfil that condition. Then the next condition which it has to fulfil is that it is to be payable "out of any personal or moveable estate or effects which such person hath had or shall have had power to dispose of." As I have already said, the testator in this case never had power to dispose of this particular fund. The disposition of this fund was effected by the settlement. Therefore, this particular fund satisfies none of the conditions which would render it liable to legacy duty. Inasmuch as it was not at the date of the Act of 1894 by law then in force liable to legacy duty, it is not liable to estate duty.

In my opinion the decision of Sankey J. was right, and the appeal ought to be dismissed.

ATKIN L.J. It was conceded before us in argument that the Crown had to show first of all that under s. 1 of the Finance

Act, 1894, the property in question passed on the death of the testator, and, secondly, that under s. 2, sub-s. 2, this is a case where legacy duty is payable in respect thereof. I agree with the judgments which have just been delivered, but it appears to me that the short mode of disposing of this case is by saying that with regard to this property legacy duty is not payable in respect thereof.

In order to ascertain whether it is or is not, one has to turn to the Revenue Act of 1845, s. 4 of which contains the present definition of "legacy." It is sufficient to read this much: "Every gift by any will or testamentary instrument of any person which by virtue of any such will or testamentary instrument is or shall be payable," as stated by the Act. To my mind the sum of money which is in question in this case is not a gift by any will or testamentary instrument, but is a gift by reason of the American settlement, which is not a will or testamentary instrument.

Therefore I think the claim of the Crown does not come within s. 2, sub-s. 2, and the decision of the learned judge is quite right.

Appeal dismissed.

Solicitors: *The Solicitor of Inland Revenue; Janson, Cobb, Pearson & Co.*

G. A. S.

BANK OF ENGLAND. [1948] 1 All E.R. 465.

Dictum of BANKES, L.J., at p. 175, *applied*. TUDOR FURNISHERS LTD. *v.* MONTAGUE & CO. [1950] 1 All E.R. 65.

NISHERS, LD. *v.* MONTAGUE, ETC. [1950] 1 Ch. 113

C. A. 1923 *March 6, 22.*

[IN THE COURT OF APPEAL.]

MAATSCHAPPIJ VOOR FONDSENBEZIT AND ANOTHER *v.* SHELL TRANSPORT AND TRADING COMPANY AND OTHERS.

[1922. M. 2366.]

Practice—Security for Costs—Debt—Assignment—Attachment—Claim by Assignees—Foreign Company added as Defendants.

Under various agreements in writing made abroad but to be deemed to be English contracts and to be construed and to operate according to English law, certain royalties on shipments and sales of petroleum became due to one D., a Dutch subject residing in England, from a Dutch company. The payment of the royalties was guaranteed by an English company and other English guarantors.

D. purported to assign his interest to another Dutch company. After the alleged assignment a third Dutch company recovered judgment against D. and obtained an order of a competent Court in Holland attaching debts due to D. from the first mentioned Dutch company. The second Dutch company and D., their assignor, brought an action in England against the first Dutch company and their guarantors to recover royalties admittedly payable under the agreements. The third Dutch company obtained leave to intervene as and be made defendants in the action. The plaintiffs applied that these defendants should be ordered to give security for costs :—

Held, that security for costs ought not to be ordered:

By Bankes L.J. on the ground that in the circumstances, including the fact that the plaintiffs, themselves foreigners and claimants, were not offering security, the Court ought to exercise its discretion by refusing to order security.

Belmonte v. *Aynard* (1879) 4 C. P. D. 221, 352, followed.

By Scrutton L.J. on the ground that the added defendants were really defending themselves against attack and therefore ought not to be required to give security; especially in view of the fact that the plaintiffs, a foreign company, were raising in an English Court questions concerning the effect of foreign legal proceedings and of a foreign assignment which could be more conveniently decided in the foreign Courts.

By Younger L.J. on the ground that the application for security was premature, for that until the added defendants had delivered their defence it was not clear that they intended to assume the position of claimants; but that if and when they should do this, the application might be renewed.

Order of Bailhache J. in chambers affirmed.

APPEAL from a decision of Bailhache J. in chambers refusing to order security for costs.

The plaintiffs Maatschappij voor Fondsenbezit (hereinafter

called the Fondsenbezit Company) and Emile Deen brought an action against the Shell Transport and Trading Company, Ld. (hereinafter called the Shell Company), the Nederlandsch Indische Industrie en Handel Maatschappij (hereinafter called the Industrie Company), the Right Honourable Marcus Baron Bearsted, and Samuel Samuel, in which they claimed 19,856*l.* 2*s.* 9*d.* for royalties as hereafter appearing. The royalties were claimed under six agreements in writing mentioned in the statement of claim. The effect of them as alleged may be shortly stated as follows: By an agreement dated April 4, 1898, called the first principal agreement, and another dated April 5, 1898, called the second principal agreement and declared to be supplemental to the first principal agreement, it was agreed that all payments in respect of petroleum or by-products or coal sold or delivered by the defendants, Lord Bearsted and Samuel Samuel, trading as M. Samuel & Co., or by any nominee of the Shell Company, to be made under certain clauses in the said agreements should be made in the following proportions: 40 per cent. to J. H. Menten, 20 per cent. to W. T. Madge, 20 per cent. to T. W. L. Emden, and 20 per cent. to the plaintiff Deen; and the defendants Lord Bearsted and Samuel Samuel jointly and severally guaranteed the above payments and the due performance by the said M. Samuel & Co. and the Shell Co. or the nominees of the last-named company. The agreements were to be deemed to be English contracts and were to be construed and were to operate in all respects according to English law.

By an agreement in writing dated October 11, 1898, called the third principal agreement, the defendants the Industrie Co. assumed all the obligations of the defendants Lord Bearsted and Samuel Samuel towards J. H. Menten, and Lord Bearsted and S. Samuel and the defendants the Shell Company made themselves severally guarantors for the performance by the Industrie Company of the obligations assumed by that company towards J. H. Menten.

By an agreement in writing dated May 10, 1899, and called the fourth principal agreement, after reciting that the

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Industrie Company was the nominee of the Shell Company contemplated in the first principal agreement, it was agreed that all the rights by the first and second principal agreements conferred upon W. T. Madge, T. W. L. Emden and the plaintiff Deen as against the nominee therein contemplated should be vested in them as against the defendants the Industrie Company as if that company had been in existence at the date of the first principal agreement and had been a party to and had executed the first and second principal agreements.

The statement of claim proceeded with the following allegations :—

(1.) That the defendants the Shell Company who were parties to these four principal agreements had thereby expressly or impliedly guaranteed the payment to the said Menten, Madge, Emden, and the plaintiff Deen of all sums due and payable under the said agreements :

(2.) That by an assignment dated October 12, 1915, the plaintiff Deen absolutely assigned and transferred to the plaintiffs the Fondsenbezit Company all his rights shares title and interest under the above-mentioned agreements and gave notice in writing to the defendants of the assignment :

(3.) That the Industrie Company had duly made the payments to Messrs. Menten, Madge, and Emden as provided by the first and second principal agreements, but that no payment had been made in respect of the share of the plaintiff Deen since the first quarter of 1920 and that 19,856*l.* 2*s.* 9*d.* was due and owing to the plaintiffs. They claimed that sum and interest.

The defendants admitted that by certain clauses in the first principal agreement a payment of 2*s.* 1*d.* per ton on every ton of petroleum or by-products was payable to J. H. Menten, W. T. Madge and T. W. L. Emden, and that these payments were to be made by the nominee or transferee of the defendants the Shell Company upon the execution by the transferee of a contract valid according to Dutch law. They pleaded that by clause 20 of the first principal agreement no failure or omission by any party or the said transferee in the observance or performance of any of the conditions

or stipulations arising from the act of God or of the Dutch rulers or from restraint or restriction of princes or Government or people should in any way be considered a breach of the agreement. They admitted that 20 per cent. of the amount payable under the first principal agreement as altered by the second principal agreement became payable to the plaintiff Deen, and that the Industrie Company became the nominee or transferee of the Shell Company and liable to make the payments under the principal agreements as modified by an agreement of November 4, 1912. They denied that the Shell Company or Lord Bearsted or Samuel Samuel undertook any liability to the plaintiffs or alternatively any liability beyond that of guarantors of the obligations undertaken towards the plaintiffs by the Industrie Company.

They further denied the alleged assignment of October 12, 1915, by the plaintiff Deen to the Fondsenbezit Company and insisted that the assignment if made at all conferred no rights on the Fondsenbezit Company for the following among other reasons: first, because that company had no existence in fact or in law; secondly, because the assignment was void by Dutch law; and thirdly, that the assignment was not a genuine document nor ever intended to be acted upon.

Para. 15 of the defence stated that the Industrie Company were always ready and willing to pay the moneys under the agreements payable to the plaintiff Deen to the persons legally entitled to them; but that they had been prevented from making any payments since the end of the first quarter of 1920 to the plaintiff Deen or any legal assignee of his by reason of the following matters: On June 28, 1920, the District Court of the Hague adjudged that the plaintiff Deen should pay to a company called the Perlak Petroleum Maatschappij (hereafter called the Perlak Company) certain moneys to be ascertained by the Court but estimated at 6,000,000 guilders Dutch currency as damages for breach of duty, and the said Court on July 1, 1920, by an order for the purpose of securing the said claim to the Perlak Company attached all cash goods or funds, including the money claimed in the present action, due or to become due

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to the plaintiffs from the defendants the Industrie Company; and notice of that attachment as by Dutch law required was duly given to the Industrie Company on July 1, 1920. On or about November 14, 1921, further proceedings were taken by the officer of the Dutch Court on behalf of the Perlak Company to prevent the Industrie Company from paying to the Fondsenbezit Company any moneys claimed by that company under the alleged assignment of October 12, 1915. The defendants the Industrie Company contended that they were prevented by these proceedings and by Dutch law from paying the moneys claimed and all the defendants contended that in the circumstances clause 20 of the first principal agreement of April 4, 1898, afforded them a good defence.

On December 5, 1922, the Perlak Company applied for leave to intervene in the action as defendants. On December 7 Bailhache J. in chambers ordered that that company should be at liberty to attend the trial of the action and if necessary intervene as defendants. On December 12, after the trial had commenced and when it was about to be adjourned for further discovery, another application was made on behalf of the Perlak Company that they might be added as defendants under Order XVI., r. 11, of the Rules of the Supreme Court on the ground that the matter in question affected their interests and that they were therefore parties whose presence before the Court was necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause. The learned judge refused the application, but gave leave to appeal. The Perlak Company appealed to the Court of Appeal. On January 29, 1923, that Court reversed the order of Bailhache J. and ordered that the Perlak Company should have liberty to intervene as and be made defendants in the action.

The plaintiffs then applied to Bailhache J. that the Perlak Company should be ordered to give security for costs. Bailhache J. refused to make the order. The plaintiffs appealed.

Neilson K.C. and *Fortune* for the appellants. No doubt the general rule is that a defendant is not required to give

security for costs. But in applying this rule the Court looks at the reality and is not misled by the appearance of the suit. In interpleader proceedings the fact that one of two claimants, a foreigner out of the jurisdiction, appears as the defendant to an issue, does not absolve him from liability to give security if he is really a plaintiff or an actor in the suit: *Belmonte* v. *Aynard* (1); *Tomlinson* v. *Land and Finance Corporation.* (2) This action is in substance an interpleader issue between the plaintiff company and the Perlak Company: *In re Milward & Co.* (3) The Industrie Company admit that the sum claimed is due to somebody and only want to be certified who that party is. The Perlak Company is a foreign company which has succeeded in intervening as a defendant in the action between the plaintiff company and its assignor on the one hand and the Industrie Company and its guarantors on the other. A foreigner intervening in an action for the purpose of asserting and not merely of protecting a right must give security for costs: *Apollinaris Co.* v. *Wilson.* (4)

R. A. Wright K.C. and *Micklethwait* for the respondents. The intervention of the respondents in this action does not involve the assertion of any claim by them. They are simply entitled to insist that property in which they are interested, their interest in which moreover has been recognized by the Court in Holland, shall not be disposed of behind their backs and in their absence. They are therefore not claimants or plaintiffs or actors, but are brought here by the action of the appellants, and therefore ought not to be ordered to give security: *In re Percy & Kelly Co.* (5); *In re Miller's Patent* (6); *In re Société Anonyme des Verreries de l'Etoile.* (7)

Neilson K.C. in reply. *Cur. adv. vult.*

March 22. The following written judgments were delivered:—

BANKES L.J. In the month of July, 1922, the appellants, the Fondsenbezit Company and Emile Deen, commenced an

(1) 4 C. P. D. 221, 352.
(2) (1884) 14 Q. B. D. 539.
(3) [1900] 1 Ch. 405.
(4) (1886) 31 Ch. D. 632.
(5) (1876) 2 Ch. D. 531.
(6) (1894) 70 L. T. 270.
(7) [1893] W. N. 119.

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action against the Shell Company and others claiming a very large sum of money alleged to be payable by these defendants to the appellant Deen. The Fondsenbezit Company claimed to be entitled to sue in their own name under an absolute assignment from Deen of which notice in writing had been duly given to the defendants. The statement of claim contains no allegation supporting any claim by Deen, but no step has been taken to strike him out of the action, and throughout the proceedings in this Court the matter has been treated as though the statement of claim contained an alternative claim by Deen in his own right in the event of any failure to establish the alleged assignment, or notice of the assignment. The defendants set up a number of defences to the claim, contending (inter alia) that the alleged assignment, if it had any existence, was invalid, and that a Dutch company called the Perlak Petroleum Company had obtained a judgment against Deen in Holland and had attached any moneys owing to him by the defendants and that by Dutch law they were not entitled to pay the moneys claimed to him. The action came on for trial before Bailhache J., and an application was made to the learned judge to allow the Perlak Company to intervene and contest the respondents' claim. At the hearing the defendants' counsel informed the judge that they admitted the debt and were prepared to pay the amount claimed to whoever was entitled to it. The learned judge refused the application of the Perlak Company but gave liberty to appeal, and adjourned the hearing of the action with liberty to apply. The Perlak Company appealed, and this Court allowed the appeal upon the ground that after the admission of the defendants that the debt was owing the real dispute was one between the plaintiffs and the Perlak Company, and that the Court had under these circumstances jurisdiction under Order XVI., r. 11, to make the order joining the Perlak Company as defendants in the action. The plaintiffs thereupon applied for an order that the Perlak Company should give security for costs. The judge refused to make an order. Hence the present appeal.

It was strenuously contended that the Court had no

jurisdiction to make a foreigner joined as defendant in an action give security for costs. This is no doubt true as a general rule, and the reason for the rule is clearly stated by Jessel M.R. in *In re Percy & Kelly Co.* (1) where he says: "The principle is well established that a person instituting legal proceedings in this country, and being abroad, so that no adverse order could be effectually made against him if unsuccessful, is by the rules of the Court compelled to give security for costs. That is a perfectly well established and a perfectly reasonable principle; but it does not apply to a defendant or respondent who is brought here to defend himself." It is equally true, however, that in interpleader proceedings the Court will look at the substance rather than at the form of the dispute and will order a party, even though he be a defendant in the proceedings, to give security if satisfied that he is really what is indifferently described as a claimant, a plaintiff, or an actor in the proceedings. *Tomlinson* v. *Land and Finance Corporation* (2) was a case of a sheriff's interpleader, but I think that the following statement of the practice by Bowen L.J. is of general application. He says (3): "When an interpleader issue has been directed and the sheriff has slipped out of the dispute, the parties who remain, that is, the execution creditor and the claimant, are both plaintiffs, they are not in the position of the parties to an ordinary action. The hand of the Court is set free, and it may use its discretion whether security for costs should be ordered." For the reason thus stated the defendant in the interpleader proceedings in that instance was ordered to give security. In the case of *Belmonte* v. *Aynard* (4) the position of the parties was complicated. The application for security was there made by a defendant in an interpleader issue who was substantially in the same position in relation to the dispute in that case as the Perlak Company are to the dispute in the present case. The Court refused the application upon the ground that the defendant was himself really in the position of a plaintiff, and therefore ought not to be allowed to put

(1) 2 Ch. D. 531.
(2) 14 Q. B. D. 539.
(3) 14 Q. B. D. 542.
(4) 4 C. P. D. 221, 352.

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the other party to the proceedings, who had been put into the position of plaintiff by the interpleader order, in a worse position than he was himself in merely because he was a foreigner. If an interpleader order had actually been made in the present case *Belmonte* v. *Aynard* (1) would, I think, be an authority for two propositions: first, that the Perlak Company are actors in the present dispute, and prima facie therefore in a position in which they would be required to find security for costs; and secondly, that the principal plaintiffs, being foreigners themselves and themselves actors in the dispute, could not require the Perlak Company to find security unless possibly they were prepared to find security themselves.

The real question, as it seems to me, in this appeal is whether, having regard to the peculiar circumstances of the case, the Court is not entitled to look at the substance of the dispute and to say that though the action remains an action in form it is in substance indistinguishable for the present purpose from an interpleader proceeding. When once the defendants admitted liability the whole character of the proceedings in my opinion changed. Had the defendants applied under Order LVII., r. 7, for an order that the Perlak Company should be substituted as defendants instead of themselves, I can see no reason why the order should not have been made. Can it make any difference in the jurisdiction of the Court that instead of the defendants applying for such an order the Perlak Company apply for leave to intervene as defendants? I think not. Speaking for myself only, I think that the order of this Court allowing the Perlak Company to intervene was made because the Court was of opinion that after the admission of liability by the defendants the dispute had resolved itself into a question of whether the Fondsenbezit Company or the Perlak Company were entitled to receive the money owing by the defendants to the plaintiff Deen. As a result I think that the Court has jurisdiction in the present case, without in the least infringing on the accepted rule that a foreigner who is made a defendant should

(1) 4 C. P. D. 221, 352.

not be ordered to give security for costs, to make an order requiring the Perlak Company to give security; but having regard to the fact that the plaintiffs who are applying for the order are themselves in precisely the same position in relation to the dispute as the Perlak Company are and are not offering themselves to give security, I think that the Court should exercise its discretion as it did in the case of *Belmonte* v. *Aynard* (1) and refuse to make any order.

For these reasons the appeal, in my opinion, fails and must be dismissed with costs.

SCRUTTON L.J. This application for security for costs in a curious proceeding seems to me to raise an important question of principle. A Dutch company, whom I will call the Industrie Company, owed a Dutchman called Deen, said to be living now in England, some money under agreements. This debt was guaranteed by an English company and two Englishmen. A Dutch company, whom I will call the Perlak Company, established by judicial proceedings in Holland a large claim against Deen, and to collect it took certain proceedings in Holland which were alleged by Dutch law to attach the debt due from the Industrie Company to Deen and prevent the former from paying it to Deen. Deen for some reason assigned to his wife the debt due to him, and for some reason his wife kindly reassigned it to him. Deen then assigned the debt to a company called the Fondsenbezit Company, who were alleged to be composed of his relatives and nominees, the assignment to take effect when Deen gave notice to the assignee. Deen gave this notice after the Perlak Company had got judgment against him. The Fondsenbezit Company and Deen then sued, not the principal debtor in Holland, but the debtor and sureties in England, although the principal questions, what was the effect of the Dutch proceedings, and whether Deen's assignment was by Dutch law void as in fraud of creditors, could obviously be most satisfactorily determined in the Dutch Courts. The principal debtor and sureties pleaded a number of defences

(1) 4 C. P. D. 221, 352.

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to the action, including the contention that the Dutch proceedings prevented them paying the plaintiffs. It was obvious however that the real fight at some time or other would be between the Fondsenbezit Company, as the alleged assignees of Deen, and the Perlak Company as creditors of Deen who claimed to have attached the debt purported to be assigned. The Perlak Company desired themselves to fight this point and therefore applied for leave to intervene as defendants in the English action, and on January 29, 1923, this Court gave them "liberty to intervene as and be made defendants in this action." The Perlak Company have been ordered to deliver a statement of defence and have not yet done so. The original defendants now profess to be ready to pay the debt to whomsoever the Court shall decide that it is justly due. Under these circumstances the plaintiffs apply that the intervening defendants shall give security for costs. It is not a question of much practical importance in this case as there is no doubt that the Perlak Company is solvent, and no difficulty in the Fondsenbezit Company, itself a Dutch company, recovering any costs awarded it against another Dutch company in Holland. But the Fondsenbezit Company appears unaccountably shy of proceedings in the Courts of its own country. The case, however, may raise an important question as to the circumstances under which a foreign defendant can be ordered to give security for the payment of costs awarded against it. The general rule as stated by Brett M.R. in *Tomlinson* v. *Land and Finance Corporation* (1) is that a defendant shall not be compelled to give security for costs, the reason being that he is required to attend at the suit of the plaintiff, and if the plaintiff chooses to sue the defendant where he has no property, that is the plaintiff's concern. This is carried so far that a foreign defendant counterclaiming is not required to give security for the costs of his counterclaim so long as it arises out of the same transaction as the claim: *Mapleson* v. *Masini* (2) and *Neck* v. *Taylor*. (3) It is otherwise if the counterclaim arises

(1) 14 Q. B. D. 539, 541. (2) (1879) 5 Q. B. D. 144.
(3) [1893] 1 Q. B. 560.

out of a different and fresh transaction: *New Fenix Co.* v. *General Accident Co.* (1) But it is said here that the Perlak Company has not been compelled to come as a defendant, but has intervened of its own free will. There are however a set of cases in which foreign claimants have come to England to protect property attacked in English proceedings, but have not been ordered to give security, because they are only there in defence of property threatened by English proceedings. Such cases are foreign shareholders opposing an English petition to wind up: *In re Percy & Kelly Co.* (2); a foreign patentee coming to resist an English application to revoke his patent or trade mark: *In re Miller's Patent* (3) and *In re Société Anonyme des Verreries.* (4) In these cases there is an invitation to come by advertisement, but the position, I think, extends to every case where the person against whom security is sought is really defending himself against attack, even if he be nominally a plaintiff, but really defending himself against defendants' previous action against him. In *Accidental and Marine Insurance Co.* v. *Mercati* (5) Wood V.-C. says: "a person who is in the position of a defendant (though nominally a plaintiff) is to be at liberty to defend himself"—without giving security. So in *Selby* v. *Cruchley* (6), where a person out of the jurisdiction had issued a distress in England, he was ordered as against the plaintiff in a suit for replevin in respect of that distress to give security, and presumably the plaintiff if a foreigner would not have been so ordered because he was defending himself against previous action. The Court always, as I understand, endeavours to be guided by the substance and not by the form of the matter, and orders security for costs against the foreign attacker, not against the foreigner defending himself or his property from attack. Thus in interpleader, the defendant to the issue may be ordered to give security to the plaintiff if the defendant is really the aggressor: *Tomlinson* v. *Land and Finance Corporation* (7) and *Rhodes* v. *Dawson.* (8)

(1) [1911] 2 K. B. 619.
(2) 2 Ch. D. 531.
(3) 70 L. T. 270.
(4) [1893] W. N. 119.
(5) (1866) L. R. 3 Eq. 200, 203.
(6) (1820) 1 Brod. & B. 505.
(7) 14 Q. B. D. 539.
(8) (1886) 16 Q. B. D. 548.

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Who is the attacker and who the defender in this case? The Perlak Company has an order of the Dutch Court attaching a debt due from the Industrie Company to Deen. The Fondsenbezit Company claims in England to recover that debt from the Industrie Company in spite of the order. The Perlak Company hears of the English proceedings and applies to be joined as a party defendant to resist the claim on the ground that the debt has been taken in execution by them in Holland, and that the Industrie Company cannot legally be compelled to pay the debt to the plaintiffs. This Court has allowed the Perlak Company to be joined as defendants to resist the claim. Though the question is a difficult one, I am of opinion that the Perlak Company are really defending themselves and not attacking, and therefore should not be ordered to give security.

But further while this Court acts on well-established rules in ordering security for costs, I think it has a discretion as to enforcing them, though the clearer the rule the stronger the case that must be made to induce the Court to depart from it. In this case, considering that a Dutch company is bringing the question of the effect of a Dutch assignment and a Dutch attachment to English Courts to decide, though its claim is against a Dutch principal debtor, and the dispute had much better be settled in Dutch Courts, I think this Court should use its discretion by declining to order security from a Dutch company in whose favour the Dutch attachment has been issued, and who reasonably comes to England to protect itself against the proceedings which the other Dutch company has started in England, to which this Court has joined it as defendant.

For these reasons I think the order of Bailhache J. should be affirmed and the appeal dismissed with costs.

YOUNGER L.J. By reason of the fact that the defendants, the Nederlandsch Indische Industrie en Handel Maatschappij —to which I shall refer as the defendant Dutch company— have presumably for reasons outside of this action, set up in their defence as their own shield the claims of the Perlak

Company against the plaintiff Deen, the essential simplicity of this action and of the relation in which the original parties to it stand to one another in respect of the matters in controversy has been obscured, and this application for security for costs has become invested with a complexity which is unfortunate. I hope that an analysis of the real position in the action as it is framed will serve to make clearer the considerations upon which the decision of this appeal should, as I think, ultimately rest.

The claim of the plaintiff Deen in the action arises under a series of agreements all of them in English form, in terms governed by English law with conventional provisions for service of process in England designed to give to the English Courts complete jurisdiction to declare and enforce upon the parties the English law by which they have all agreed to be bound. The plaintiff Deen is the person to whom the payments sued for in the action are expressed in the agreements to be payable. He is resident in England. His co-plaintiff, the plaintiff Dutch company, is, it is alleged, his assignee by virtue of an assignment in writing dated October 12, 1915, of all his rights and interests under the agreements. That assignment is alleged to have been duly notified to the defendant Dutch company in writing. On the face of the statement of claim therefore the cause of action is under s. 25 of the Judicature Act, 1873, in the plaintiff Dutch company and in that company alone. It was the only necessary plaintiff. Deen, however, the assignor, sues as co-plaintiff. In ordinary circumstances this joinder as plaintiff would have been quite superfluous; but one result of it here has been that the question whether the assignment of October 12, 1915, is good or bad, illusory or even fraudulent, has always been so far as this action is concerned a matter of no concern whatever to the original defendants, unless they, or some or one of them, had some cross-claim against one plaintiff but not against the other. There is, however, no such cross-claim set up. The only question in the action accordingly, as between the defendants on the one hand and the plaintiffs on the other, was whether

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the money payable to Deen under the agreements and alleged to be due and unpaid was in fact due and payable. The joinder as plaintiffs of both Deen and his assignee would give the defendants a complete discharge as between them and the plaintiffs whether there was in fact any assignment or not from one to the other. Now the defence denies any liability to make any payment at all. At the trial however it was admitted that the sum sued for was in fact due and unpaid. On that admission being made there ceased to be, as between the plaintiffs and the defendants, any question whatever. But so long as that issue was contested it would seem that, whatever may have been their real motives in taking that course, the plaintiffs cannot be blamed for having that issue adjudicated upon in England in view of the provisions of the agreements sued on to which I have been referred. I conceive that in face of these provisions it might well have been that the English defendants were not amenable to the jurisdiction of any Dutch Court, and it was obviously convenient, if not necessary, that the obligant parties to the agreements, whether principal debtor or guarantors, should all be parties to any proceedings to enforce them.

But the plaintiff Deen, it is alleged, is largely indebted to the Perlak Company, another Dutch company, the respondents upon this appeal, under a judgment recovered against him in Holland on June 28, 1920, long after, it will be noticed, the alleged assignment by Deen to the plaintiff Dutch company of October 12, 1915. It is alleged further that by the District Court at the Hague on July 1, 1920, an order has been made attaching for the purpose of satisfying that judgment debt (inter alia) all moneys payable by the defendant Dutch company to the plaintiff Deen under the agreements sued upon in this action; and it is alleged that written notice of that attachment was, as by Dutch law is required, given to the defendant Dutch company on July 1, 1920, the result of which is that by Dutch law the defendant Dutch company will at their peril pay to Deen or any other assignee from him any moneys sued for in this action. There is no allegation in the pleadings one way or the other whether the notice

to the defendant Dutch company of the plaintiffs' assignment was or was not given before July 1, 1920. In these circumstances the course to be taken in these proceedings by the original defendants, if their actions had been undisturbed by outside considerations, was clear: it was, so soon as liability was no longer contested, to do what under precisely similar circumstances was done by the defendant debtors in *Belmonte* v. *Aynard* (1)—namely, take out an interpleader summons, to which Deen, the plaintiff Dutch company, and the Perlak Company would be parties to determine the rights of these persons in the moneys which the defendant Dutch company no longer denied were due to Deen in a question between themselves and him. Had such a step been taken it is, I think, obvious that in these interpleader proceedings the position of the Perlak Company would have been that of claimants, and an order upon them to give security for costs in the absence of proof of assets within the jurisdiction would have been a matter of course. Moreover, their position in such proceedings would have been natural and obvious. They would be claiming payment for themselves in or towards satisfaction of Deen's debt to them of the moneys now admitted by the defendant Dutch company to be due and payable to him or to somebody on his behalf. No such simplicity of procedure however has commended itself to the parties. The Perlak Company seems more anxious to prevent payment of the moneys in question to anybody else than to obtain payment of them for themselves; the original defendants appear to be in sympathy with that attitude and their procedure has been designed apparently to assist it. Instead of adopting the simple course above indicated they delivered an elaborate defence in which, after denying liability to pay at all, they alternatively set up and assume the burden of the Perlak Company's case in justification of their own position that in this action to which the Perlak Company were not then, and to which they did not propose to make them, parties, they should not, even if liable under the agreements to Deen, be ordered to pay the moneys to anybody

(1) 4 C. P. D. 221.

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at all. In that state of the pleadings the action came on for trial. At the trial liability under the agreements was, as I have said, at length admitted. But the Perlak Company at the same moment appeared and asked to be made defendants. Their application was refused by Bailhache J. They appealed, and by an order of this Court of January 29 they were given liberty to intervene as and be made defendants in this action. The propriety of that order has not, of course, been canvassed on this application. It is, however, permissible to inquire what grounds were put forward by the Perlak Company for the liberty to intervene which they then sought and obtained. They must, I think, clearly have been grounds which led this Court to give them the opportunity as defendants and interveners of claiming for themselves as against both plaintiffs payment of the moneys for which the other defendants or one of them admitted liability. This Court obviously considered it both just and convenient that they should be allowed in this action to make their case and assert their rights against the plaintiffs. The Court, of course, if so satisfied had no choice but to add them as defendants, but whether as against the plaintiffs they were to put forward their claim in their defence, or whether more naturally they were to do so by counterclaim, their position in the action would in substance be that of claimants, and again in that position an order against them for security for costs would as before be in my judgment, apart from some special circumstances, almost a matter of course. Presumably it was in that view of the case that the present application was made. But the Perlak Company have not yet delivered any defence, and it was indicated before us by Mr. Wright on their behalf that when they do deliver that pleading they may not claim payment of any moneys to themselves; they may content themselves with the allegation in the existing defence of their co-defendants, that in view of their rights under the Dutch attachment no payment can be ordered to be made by the defendant Dutch company to the plaintiffs or to either of them. In that event, said Mr. Wright, they would be merely passive defendants from whom no

security for costs could be required. I am not prepared to say, before the defence has been delivered, whether that contention will be well founded or not. Its fate will depend upon the actual terms of the document. I cannot say in advance what inference I shall draw from the attitude of an unpaid creditor who is apparently too proud to take payment of his debt. I will however say this now, that in my judgment if the defence when delivered is sufficiently negative in character to relieve the Perlak Company from liability for security for costs on that ground, it may be in grave danger of being struck out altogether as not being in conformity with the representations by means of which they were given liberty to intervene in these proceedings. As I have already indicated, their position as alleged creditors of the plaintiff Deen with the moneys due to him by the defendants alleged to be charged in their favour, was quite clear. As against the original defendants the claim of the Perlak Company and of the plaintiffs was the same. They were not made defendants to this action that they might dispute any liability of their co-defendants under the agreements sued on. They were made defendants as persons claiming under the plaintiff Deen to obtain payment of these moneys for themselves in priority to, or disregarding altogether, the claim to the same moneys of the plaintiff Dutch company. If now that they are parties to the action they refrain from claiming the moneys for themselves, but merely assert that the defendant Dutch company must not pay them to the plaintiffs, or either of them, there may then, in my judgment, be good ground for dismissing them from the action altogether. That attitude would be merely embarrassing; nor, whatever may be their complaints against the plaintiff Deen outside this action, would it be just to the plaintiffs. It might result in money which admittedly is due to the plaintiff Deen or to some one properly claiming under him, being left outstanding and unapplied, either in meeting claims upon him or for his own necessities or purposes. In taking up that attitude the Perlak Company would not be assuming the part which alone entitled them to be included

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in the caste of this action. They would be merely playing the role of dog in the manger; and (I speak for myself) in my judgment that is a role which ought not in these proceedings to be allowed them, whatever may be the merits of their case against Deen outside of these proceedings.

For myself, therefore, I prefer to dispose of this application on the ground merely that it is premature. The respondents have not yet sufficiently disclosed their position to enable the Court to say with any certainty whether, although defendants only, their substantial position will be that of claimants. If it appears when that position is fully disclosed that they are in effect claimants, then this application for security for costs can be renewed. Nor, in my judgment, would it necessarily be any answer to that application that it may in turn be open to the Perlak Company to have security ordered as against the plaintiff Dutch company. I do not fail to note that there is a co-plaintiff within the jurisdiction. But whether such a counter application would be well or ill founded, its fate should not, in my judgment, be decisive of any similar application against the present respondents.

On the whole therefore, but for the reasons I have given, I concur in the view that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Morley, Shireff & Co.*

Solicitors for respondents: *Freshfields, Leese & Munns.*

W. H. G.

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[1923. W. 96.]

Landlord and Tenant—Flat—Lease—Rent which includes Payments in Respect of "attendance"—Covenant by Landlord to supply Hot Water—Agreement that Caretaker shall deliver to Tenant Letters and Parcels—"Attendance"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 2 (*i.*).

A lease of a flat provided that the landlord should supply "a good and sufficient supply of hot water for the demised premises at all times of the day." It also provided that the caretaker should receive and deliver to the tenant all letters, messages and parcels. In an action by the landlord, upon the expiration of the lease, to recover possession of the premises:—

Held, that the supply of hot water to the tenant through a pipe was not "attendance" within the meaning of the proviso to s. 12, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and that, although the delivering of letters, messages and parcels to the tenant constituted attendance, the services so rendered were of such a trivial character that the maxim "De minimis non curat lex" must be applied in favour of the tenant, and that the letting was therefore not excluded by the proviso from the operation of the Act as being a letting at a rent which included a payment in respect of "attendance."

Nye v. *Davis* [1922] 2 K. B. 56 considered.

ACTION tried before McCardie J. under Order XIV., r. 8A. The action was brought to recover possession of a flat demised to the defendant.

The following statement of facts is in substance taken from the judgment of McCardie J.:—

The lease was made between the parties in January, 1919, for a term of three years from September 29, 1919. It expired on September 29, 1922, and the plaintiff thereupon claimed possession of the premises. The defendant refused to give up possession on the ground that he was protected by the provisions of the Act. The lease was a lease of the top floor of a building at Eastbourne, No. 28 Hyde Gardens. By clause 2 the tenant covenanted to pay the rent, and "to observe and strictly conform to the general regulations for the time being governing all suites of rooms in the said building contained in the Schedule hereto." By clause 3 the landlord covenanted with the tenant as follows: "To

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keep the exterior of the said premises . . . . in good and substantial repair at all times during the said term; to keep the entrance to the said messuage and the hall and staircase clean and in good order, and the hall and staircase properly and adequately lighted." The landlord further covenanted "to provide and supply a good and sufficient supply of hot water for the said demised premises at all times of the day." There were at the end of the lease certain general regulations, one of which provided that "the care of the front entrance shall be in the charge of the resident caretaker and such entrance will be kept open or shut by him or her according to the landlord's instructions." There was also a regulation as follows: "All coals required shall be brought up from the cellars and all refuse taken down to the dustbin before 9 A.M." There were also regulations as to the resident caretaker. The first was that the caretaker should be appointed and be removable by the landlord and should be paid by him for the performance of his or her duties. The regulations then stated the general duties of the caretaker. He or she was to reside in the building, and was to properly cleanse the entrance hall and staircase and attend to the lighting, and was to "receive and deliver to the several tenants all letters, messages, and parcels." Each bath in the various suites had a hot-water tap, and there was also a tap for hot water to the basins, and also to the sinks in the kitchens. The plaintiff in fact to a substantial degree, though not at all times, did supply the defendant with hot water in accordance with the terms of the lease up to the afternoon, and therefore for a substantial part of each day the defendant was supplied with hot water. The caretaker in fact took up coal for the defendant several times a week and took down refuse from the defendant's flat, but in neither case did the caretaker enter the flat. She delivered the coal outside the flat, and removed the refuse from where it had been deposited outside the flat. The caretaker usually took up letters and parcels to the defendant's flat and handed them in. She did not, however, do this invariably, for at times letters and parcels were left in the hall and were taken up by the defendant.

The plaintiff contended that the premises were let at a rent which included payments in respect of "attendance" and that the defendant was not therefore protected by the provisions of the Act of 1920. (1)

Horton Smith for the plaintiff. The present case comes within the principle laid down in *Nye* v. *Davis*. (2) The plaintiff here covenanted to supply a good and sufficient supply of hot water for the demised premises at all times. That constitutes "attendance" within the meaning of the proviso to s. 12, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The provision in the regulations that all coal shall be brought up from the cellar and all refuse taken down to the dustbin before 9 A.M. also constitutes attendance within the proviso. Although there is no express covenant by the landlord to abide by the regulations, there must be an implied covenant. The regulations form part and parcel of the lease, and the tenant has no right to go to the coal cellar or the dustbin.

Finally, the provision that the caretaker shall receive and deliver to the tenants all letters, messages and parcels shows that there was to be personal attendance by the landlord or his servant.

[He also referred to *Crane* v. *Cox* (3); *Wilkes & Jones* v. *Goodwin* (4); and *Dick* v. *Duncan*. (5)]

Flowers for the defendant. This house was not bona fide let at a rent which included "payments in respect of attendance" within the meaning of s. 12, sub-s. 2, of the Act of 1920. There was no real charge for attendance in the rent. In *King* v. *Millen* (6) it was held that an agreement by a landlord to keep the hall and staircase of the demised premises properly cleaned did not constitute "attendance"

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 2 (i), proviso: "This Act shall not, save as otherwise expressly provided, apply to a dwelling-house bona fide let at a rent which includes payments in respect of board, attendance, or use of furniture."

(2) [1922] 2 K. B. 56.

(3) (1923) 39 Times L. R. 204.

(4) Ante, p. 86.

(5) [1923] W. N. 90.

(6) [1922] 2 K. B. 647, 650.

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within the meaning of s. 12, sub-s. 2 (i.). The Court distinguished *Nye* v. *Davis* (1), and Shearman J. said: "The word 'attendance' in this collocation of words . . . . implies, I think, something in the nature of personal service in the flat just as 'board' and the 'use of furniture' involve something in the flat itself."

No real charge was made in the rent for the services of the caretaker in delivering to the tenant letters, messages and parcels, but if any such charge was in fact made, the matter was so trivial as to be negligible, and the maxim "De minimis non curat lex" should be applied: *Crane* v. *Cox*. (2)

[He also referred to *Wood* v. *Wallace* (3) and *Hocker* v. *Solomon*. (4)]

Horton Smith in reply. There can be no question as to the bona fides of this letting. The only question is whether the rent included a payment for attendance. The supply of hot water and the delivery of letters and parcels to the tenant amounted to "attendance": Imperial Dictionary, "Service"; Les Termes de la Ley, p. 61, "Attendant."

McCARDIE J. This case raises again the problem which has been discussed in other cases in connection with s. 12, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. [The learned judge read the proviso to the sub-section, stated the facts, and continued:] The question is whether the facts which I have stated exclude this lease from the operation of the Act? In my opinion the actual practice which has prevailed at the flat since the lease is not material except in so far as it may have some bearing on the construction of the lease.

In order to ascertain whether or not the letting is excluded from the Act I think it is essential to confine oneself to the actual terms of the letting, certainly in such a case as the present where the document is a formal one under seal. It is therefore necessary to look at the terms of the lease, but before

(1) [1922] 2 K. B. 56.
(2) (1923) 39 Times L. R. 204.
(3) (1920) 90 L. J. (K. B.) 319.
(4) (1921) 91 L. J. (Ch.) 8.

doing so, I desire to express my own view as to the object with which the proviso was inserted in s. 12. In my opinion the object was to exclude from the operation of the Act flats in which the landlord by his servants renders actual service within the flat itself by a chambermaid, valet, waiter or the like. Whatever may be my own view, however, I am of course bound to pay the fullest attention and respect to the decisions which have been given in regard to the matter. This proviso has been interpreted in several cases. In *Nye* v. *Davis* (1) there was a covenant by the landlord to remove refuse from the flat and to carry up to the flat the coal required. That was not in fact an interior service to the flat, yet the Court held that there was "attendance" within the meaning of the proviso. *Nye* v. *Davis* (1), though much criticised and frequently doubted, has not, so far as I know, been definitely overruled. Indeed I think that it must be treated as a decision which, so far as it goes, is still binding. The next decision was *King* v. *Millen*. (2) There the substance of the landlord's obligation to his tenant was that he should allow the tenant to use the main entrance, door and staircase and the light, and should keep the hall and staircase properly clean. In that case the Divisional Court distinguished *Nye* v. *Davis* (1), which obviously did not fully commend itself to them, and held that the agreement to keep the hall and staircase properly clean did not constitute "attendance" within the meaning of the proviso—in other words, they held that there was no specific personal duty fulfilled by the landlord to the tenant either in the flat itself or in carrying up and taking down articles from the flat. I gather from the decision of the Court of Appeal in *Wilkes & Jones* v. *Goodwin* (3) that the two cases to which I have referred are regarded as existing authorities. The next case which calls for mention is the recent case of *Dick* v. *Duncan*. (4) I at first thought that the decision in that case went beyond that in *Nye* v. *Davis* (1), but I have been able to consult the lease which was there in question, and I now appreciate the

(1) [1922] 2 K. B. 56.
(2) [1922] 2 K. B. 647.
(3) Ante, p. 86.
(4) [1923] W. N. 90.

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statement by Eve J., that in substance the agreement in the case before him was the same as that in *Nye* v. *Davis*. (1) That being the case, I do not think that the decision in *Dick* v. *Duncan* (2) carries the matter any further, but it is important as showing that a learned judge of the Chancery Division recognized that *Nye* v. *Davis* (1) was an existing authority notwithstanding *King* v. *Millen*. (3) That being the state of the authorities, let me take the first point mentioned by Mr. Horton Smith as bringing this case within *Nye* v. *Davis*. (1) He said that the landlord here covenanted to provide and supply a good and sufficient supply of hot water for the demised premises at all times, and he invited me to hold that that constitutes "attendance" within the meaning of the proviso. In my view it is not attendance within the proviso, and in dealing with cases under this Act I think it is desirable that a judge should express a definite view. If it is right, so be it, and if it is wrong, then let another tribunal say so. I think the word "attendance" in the proviso refers to actual personal attendance by the landlord's servants or agents having actual corporeal existence. This view is supported by the meaning given to the word in Dr. Johnson's Dictionary and in the Imperial Dictionary, and there is nothing in the definition of the word "Attendant" in Termes de la Ley to destroy the conclusion at which I have arrived. If the supply of hot water is to be deemed personal attendance, I cannot understand how *King* v. *Millen* (3) could exist as an authority. I also wish to point out that if it be "attendance" to send up hot water through pipes, it is difficult to see why gas supplied through a pipe which can be operated by a tap in the basement should not also amount to "attendance," or electricity supplied in a similar manner.

In the present case in my opinion there was no attendance at all. If, however, contrary to my opinion, it should be held that a supply of hot water through a pipe is to be deemed attendance, in the present case it is plain that the attendance would be of a sufficiently substantial nature to make the lease

(1) [1922] 2 K. B. 56. (2) [1923] W. N. 90.
(3) [1922] 2 K. B. 647.

bona fide within the Act, because the cost of the hot water system is a substantial matter. I only desire to add that, in my view, the cases of *Wood* v. *Wallace* (1) and *Hocker* v. *Solomon* (2) do not affect the points now raised.

Mr. Horton Smith then contended that the provision in the regulations by which it is provided that all coals required shall be brought up from the cellars and all refuse taken down to the dustbin before 9 A.M. constituted attendance within the proviso. On the interpretation of this clause I think that there is no covenant by the landlord at all. From the words of the clause I think that the assumption is that it is the tenant who is to take down the refuse and bring up the coal, and that the regulation is merely a limitation of his right to do these acts at any time he chooses, by imposing upon him the obligation of doing them before 9 A.M.

Finally, the words which Mr. Horton Smith suggests apply are those appearing in the rules for the resident caretaker. It is there provided that the caretaker "shall receive and deliver to the several tenants all letters, messages and parcels." Those words undoubtedly indicate personal service and constitute a difficulty in the defendant's way which must be carefully considered. Upon the whole, though there is no express covenant by the landlord in regard to this matter, I incline to the view that there is an implied covenant on his part, and I need only refer to the authorities mentioned in Leake on Contracts, 7th ed., pp. 157 et seq. Now if there be, as I think there is, an implied covenant by the landlord with respect to the letters, messages and parcels, there arises in this case definitely a consideration of the application of the rule "De minimis non curat lex," which was recently referred to in the Court of Appeal in *Wilkes & Jones* v. *Goodwin*. (3) I observe that neither of the Lords Justices who constituted the majority of the Court gave any definite indication of his views as to the principles on which the rule is to be applied. It is a rule which it is easy to state; the difficulty lies in the measure and extent of its application, and each judge must, I presume, decide this matter for himself.

(1) 90 L. J. (K. B.) 319. (2) 91 L. J. (Ch.) 8. (3) Ante, p. 86.

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I express again my own personal view that, bowing as I must to the opinion of the majority of the Court, and following their view as against that of Younger L.J., the rule "De minimis non curat lex" must be applied in cases like the present with robust vigour in favour of the tenant unless the protective object of the Act is to be substantially defeated. I think there is much force in the observations made by the Court in *Crane* v. *Cox* (1), although I agree that the ratio of the judgment in that case must be considered in the light of the opinion of the majority of the Court of Appeal in *Wilkes & Jones* v. *Goodwin*. (2) In considering the application of the rule, the observations of Bankes L.J. in that case are important, because he refers to the question of substantiality as being an important matter in dealing with the rule. In the present case, holding as I do that the supply of hot water is not within the rule, and that the provision as to coals and refuse is immaterial, I ask myself: "Can I say that this lease is excluded from the Act of 1920 because the landlord agreed that the caretaker should receive and deliver to the tenant all letters, messages and parcels?" I am compelled to hold that this is a case for the application of the rule "De minimis non curat lex." If it is not, I know not how the rule could ever be applied. The whole substance of the caretaker's business is outside the delivery of letters, parcels and messages, which forms a most trivial part of her duties, involving going upstairs possibly two or three times in the day. It is so slender a part of her duties that it cannot in my judgment be regarded otherwise than as coming within the rule. If the landlord were to say that these services of the caretaker should cease to be rendered, my own view is that there would not be an alteration of one shilling in the rent which would be asked for the premises. The result is, applying the views which I have deemed it proper to express with frankness in order to secure for this Act some working clarity, that I hold, in spite of the able argument which has been addressed to me on his behalf, that the plaintiff is not entitled to recover possession, and that there was not in this case any bona

(1) 39 Times L. R. 204. (2) Ante, p. 86.

fide letting of the premises at a rent which included "attendance" within the meaning of the proviso to s. 12, sub-s. 2, of the Act.

Judgment for the defendant.

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Solicitor for the plaintiff: *F. H. Loseby, for C. W. Mayo, Eastbourne.*

Solicitors for the defendant: *Langhams, for R. A. Niedermayer, Eastbourne.*

F. C.

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April 10, 11, 19.

[1923. H. 456.]

Gaming—Cheques given for Racing Bets—Action for Repayment—Cause of Action arising before Gaming Act, 1922*—Writ issued after Act—Right to recover—Vested Rights—Gaming Act,* 1835 (5 *&* 6 *Will.* 4, *c.* 41), *s.* 2 *—Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63), *s.* 38, *sub-s.* 2 (*c*)*—Gaming Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 19), *s.* 1.

By s. 1 of the Gaming Act, 1922, no action under s. 2 of the Gaming Act, 1835, to recover back money paid in respect of gaming debts "shall be entertained in any court." The plaintiff, after the Act of 1922 came into force, issued a writ in respect of causes of action which had arisen before that Act came into force:—

Held, that the plaintiff's cause of action, vested in him before the Act of 1922 came into force, was not divested on the Act coming into force, and that he was entitled to recover.

ACTION tried by McCardie J.

In 1919 the plaintiff paid the defendant cheques in payment of betting losses amounting in the aggregate to 333*l.*, which cheques were duly honoured by the plaintiff's bankers. On July 20, 1922, the Gaming Act, 1922 (12 & 13 Geo. 5, c. 19), came into force. On February 23, 1923, the plaintiff issued the writ in this action, claiming, under s. 2 of the Gaming Act, 1835 (5 & 6 Will. 4, c. 41), the return of the 333*l.* It was admitted that if the Act of 1922 applied, the plaintiff's claim was barred, the question being whether it did apply. The arguments and the sections of the statutes sufficiently appear in the judgment.

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J. G. Hurst K.C. and *J. Forster* for the plaintiff.

E. G. Palmer for the defendant.

Cur. adv. vult.

1923. April 19. McCARDIE J. read the following judgment. The decision of this case depends on the interpretation of the Gaming Act, 1922. The facts are not in dispute. In the year 1919 the plaintiff made bets with the defendant on horse races. To settle his losses he gave five cheques to the defendant between June and August, 1919, to the total amount of 333*l.* Each cheque was presented to and paid by the plaintiff's bankers. Hence this action for the 333*l.* under the Gaming Act, 1835. It is admitted that under s. 2 of that Act, as interpreted by *Sutters* v. *Briggs* (1), the plaintiff is entitled to succeed unless his causes of action were destroyed by the Gaming Act, 1922, which became law on July 20, 1922. The writ in this action was issued on February 23, 1923. The words of s. 1 of the Gaming Act, 1922, are these: "Section 2 of the Gaming Act, 1835 . . . . is hereby repealed. No trustee, executor, or other person acting in a representative or fiduciary capacity shall be under any obligation to make or enforce any claim under the said section in respect of any transaction completed before the passing of this Act, or be liable for any breach of duty by reason of any failure to do so. No action for the recovery of money under the said section shall be entertained in any court."

The Act is very short and is admittedly obscure. It is necessary to state the various sets of fact which existed when it was passed. They fall under three main heads. First, where the cause of action had arisen before July 20, 1922, and the writ had been issued before that date. Secondly, where the cause of action had arisen before July 20, 1922, but a writ had not then been issued. Thirdly, where the cause of action had accrued and a writ issued and a judgment given, e.g., in favour of the defendant, before that date, and an appeal had been brought by the plaintiff after July 20,

(1) [1922] 1 A. C. 1.

1922, either from a Court of first instance to a Court of Appeal or from a Court of Appeal to the House of Lords. I need not further refer to the third class except to point out that the words of the Act of 1922 are: "No action for the recovery of money under the said section shall be entertained in any court." The word "court" normally includes appellate Courts.

With respect to actions of the first class there has been much litigation. In *Bowling* v. *Camp* (1) I held that the Act of 1922 did not in any event prevent the continuance of an action which had been commenced before July 20, 1922. This view was affirmed by the Court of Appeal in *Beadling* v. *Goll*. (2) The decision of that Court was based on the principle indicated by the Court of Appeal in *Smithies* v. *National Association of Operative Plasterers*. (3) The case now before me falls within the second class mentioned, for here the causes of action arose in 1919, but the writ, as I stated, was not issued until some months after the passing of the Gaming Act, 1922. The question, then, is whether or not that Act bars the present action. In *Bowling* v. *Camp* (4) I expressed the view that the Gaming Act, 1922, did not prevent the issue of writs after July 20, 1922, in respect of causes of action which had actually and fully accrued before that date. That view, however, was an opinion rather than a decision, inasmuch as the point, though fully discussed in the arguments before me, did not call for express determination on the facts of the case, because the writ had there been issued before the passing of the Act of 1922. Mr. Palmer for the present defendant has asked me to reconsider in the present case the opinion I expressed in *Bowling* v. *Camp* (4) and has presented an able and ingenious argument on behalf of his client. In deference to his argument I have examined the question afresh.

It will be noted that the Gaming Act, 1922, has three parts. I take them separately. The first part repeals s. 2 of the Act

(1) [1922] W. N. 297; 39 Times L. R. 31.
(2) (1922) 39 Times L. R. 128.
(3) [1909] 1 K. B. 310.
(4) [1922] W. N. 297, 298; 39 Times L. R. 31, 34.

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of 1835. It is plain that this repeal does not of itself destroy any rights which had accrued prior to July 20, 1922, under the statute of 1835. It is essential to remember that the Act of 1922 must be read subject to the Interpretation Act, 1889 (52 & 53 Vict. c. 63). By s. 38, sub-s. 2 (*c*), of that Act it is provided (inter alia) that where any Act passed after 1889 repeals any other enactment, then, unless the contrary intention appears, the repeal shall not "affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed."

The second part of the Act of 1922 provides that no trustee or executor shall be under any obligation to make or enforce any claim under the said section in respect of any transaction completed before the passing of the Act or be liable for any breach of duty by reason of any failure to do so. This is a conspicuous part of the statute, and it contains by far the greatest number of carefully framed words. Full effect must be given to it and it must be read in conjunction with the rest of the enactment. Now, in my humble opinion, every portion of this second part of the Act of 1922 points to the conclusion that existing and accrued rights were not destroyed. The words "No trustee, executor . . . . shall be under any obligation" refer to the future, and not to the past. They assume that but for the relieving words a trustee or executor would be bound after the Act had passed to enforce existing rights under the Act of 1835. In the next place the words "make or enforce any claim" seem to refer not merely to pending proceedings but also to future assertions by writ or otherwise of existing claims. In the third place the words "any transaction completed before the passing of this Act" seem to show that the test is not whether an action has been begun, but whether a right has accrued before July 20, 1922. In my view the phrasing of the second part of the Act substantially supports the argument of Mr. Hurst for the plaintiff. The third part of the Act says that no action for the recovery of money under s. 2 of the Act of 1835 shall be entertained in any court. Mr. Palmer for the defendant naturally laid great emphasis on these words.

Taken by themselves, apart from the context, apart from principle and apart from the decisions, I should agree that these words lend apparent force to the defendant's argument. But the weight of the words is at once greatly diminished when attention is given to the second part of the Act. If no action could under any circumstances be commenced after July 20, 1922, then the second part of the Act would seem to be superfluous, if not absurd. The Act can only be made a consistent whole if the words " No action . . . . shall be entertained in any court " are regarded as merely an emphatic assertion of the intention of the Legislature that a writ issued after July 20, 1922, under s. 2 of the repealed Act of 1835, for a cause of action alleged to arise after that date shall at once be set aside as an abuse of the Court : see *Vacher & Sons* v. *London Society of Compositors* (1), where the alleged cause of action arose after the passing of the Trade Disputes Act, 1906 (6 Edw. 7, c. 47).

In my opinion the Act of 1922 must be considered in the light of the settled, recognized and beneficent rule of law that existing rights are not to be deemed to be destroyed by a statute unless there be express words or the plainest implication to that effect. I need not cite the overwhelming body of authority as to this ; many of the decisions and text-books are quoted in *Bowling* v. *Camp.* (2) I see nothing in the Act of 1922 which compels me to give it a retrospective operation. Take the broad facts here. On July 20, 1922, the plaintiff possessed fully accrued rights under the Act of 1835. The defendant then owed him statutory debts : see *Cohen* v. *Hall.* (3) These debts constituted property in the fullest sense of the word. Can it justly be said that on July 20, 1922, that property was wholly destroyed by an ambiguously worded Act of Parliament ? In my opinion the answer is No. It should, I venture to think, be remembered that in many cases the statutory debts under the Act of 1835 may have been assigned for value or may have been mortgaged to secure advances.

(1) [1912] 3 K. B. 547 ; affirmed [1913] A. C. 107.

(2) [1922] W. N. 297 ; 39 Times L. R. 31.

(3) [1922] 2 K. B. 37.

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I beg respectfully to say that in my view it is important to maintain the rule of law that existing rights are not to be deemed destroyed unless an Act of Parliament is clear to that effect.

Now in considering the words "No action for the recovery of money under [s. 2 of the Act of 1835] shall be entertained in any court" I must refer to several relevant decisions. In *Smithies* v. *National Association of Operative Plasterers* (1) it is true that the action was begun before the Trade Disputes Act, 1906, was passed. But in my view the ratio of the decision in that case was that the Act of 1906 did not destroy existing rights. As Vaughan Williams L.J. put it (2): "Any reasonable person would say that clear terms ought to be used, if it is intended to divest a vested right." I happened to be counsel in that case and my recollection is clear, quite apart from the report, that the ratio was as I have stated. The pendency of the action was an incident and not an essential. In *Gillmore* v. *Shooter* (3) the point arose on the Statute of Frauds (29 Car. 2, c. 3), which was passed in 1676. It provided in s. 4 that "no action shall be brought" in certain cases without a writing testifying the promise. Before that statute became law a cause of action accrued to the plaintiff, but he had no writing in support. After the statute was passed he commenced his action. It was held that the words "no action shall be brought" did not debar his claim, for (as the Court said) "it could not be presumed that the Act had a retrospect to take away an action to which the plaintiff was then entitled."

It will be found that from 1677 to the present day *Gillmore* v. *Shooter* (3) has always been accepted as a sound and binding decision. It illustrates the established presumption that a statute is not retrospective so as to destroy accrued claims. I can see no valid distinction between the words "No action shall be brought" and "No action . . . . shall be entertained."

In *Moon* v. *Durden* (4) the point turned on s. 18 of the

(1) [1909] 1 K. B. 310.
(2) Ibid. 319.
(3) (1677) 2 Mod. 310.
(4) (1848) 2 Ex. 22.

Gaming Act, 1845 (8 & 9 Vict. c. 109), which provided that wager contracts should be null and void and that "no suit shall be brought or maintained" to recover money won on a wager. In that case the plaintiff had in fact brought his action before the Act of 1845 was passed. The Court held that the action so brought could be continued. If the opinions of the majority (Rolfe, Alderson and Parke BB.) are examined, it will, I think, be seen that they held the opinion that the action would have lain even if it had been brought after the passing of the Act of 1845: see the view taken in Maxwell on Statutes, 6th ed., p. 385. Thus, for example, Parke B. cited *Gillmore* v. *Shooter* (1) with approval (2) and later he said (3): "I . . . . am disposed to say that the clause affects none but future wagers."

The case of *Towler* v. *Chatterton* (4) was distinguished by Rolfe B. on the special ground he there indicated. (5) Finally in *Knight* v. *Lee* (6) the Divisional Court had to consider the Gaming Act, 1892 (55 & 56 Vict. c. 9), which enacted that a promise to repay a person moneys paid by him on a wager void under the Gaming Act, 1845, should itself be void and provided by s. 1 that: "No action shall be brought or maintained to recover any such sum of money." In that case the plaintiff before the passing of the Gaming Act, 1892, paid losses on the defendant's behalf, but he did not issue his writ until after the Act was passed. It was held by Mathew and Bruce JJ. that the action was rightly brought and that the Act did not destroy the vested claims or bar the commencement of fresh actions to enforce them. In my view *Knight* v. *Lee* (6) has always been regarded as a correct decision. It was mentioned as a valid authority by Buckley L.J. in *West* v. *Gwynne*. (7) It has never been challenged in any Court. It covers, I think, the present case. I venture to say that the ratio of *Knight* v. *Lee* (6) is identical with that of *Smithies* v. *National Association of Operative Plasterers* (8), of *Gillmore* v. *Shooter* (1), and of

(1) 2 Mod. 310.
(2) 2 Ex. 22, 43.
(3) Ibid. 45.
(4) (1829) 6 Bing. 258.
(5) 2 Ex. 22, 34.
(6) [1893] 1 Q. B. 41.
(7) [1911] 2 Ch. 1, 12.
(8) [1909] 1 K. B. 310.

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Moon v. *Durden*. (1) I need only refer further to Maxwell on Statutes, 6th ed., pp. 383 et seq., and the cases there cited.

So the matter stands on the relevant decisions.

Towards the end of his argument Mr. Palmer discussed, with acuteness and force, the interpretation of the Act of 1922 in relation to the policy of the Legislature with respect to betting as revealed in past and existing legislation. I think that it might be more correct to refer to the variation of policy. For several centuries the course of legislation has been remarkable. The confusion and inconsistency at the present day is equally striking. Betting in certain specific methods or places is criminally punishable; yet, speaking broadly, betting in itself is perfectly legal. At common law bets or wagers were neither illegal nor void except in special cases involving, e.g., public morality. Since the Act of 1845 they have been unenforceable. As Lush J. said in *Haigh* v. *Sheffield Town Council* (2): "By [the Act of 1845] ordinary betting was treated as a thing of neutral character, not to be encouraged, but on the other hand, not to be absolutely forbidden; and it left an ordinary bet a mere debt of honour, depriving it of all legal obligation, but not making it illegal." I may point out that a valid partnership may exist in a betting business (see *Jeffrey* v. *Bamford* (3), and that a bookmaker must pay income tax on his profits (see *Partridge* v. *Mallandaine*). (4) The State takes a large part of his gains. The whole legislation and law on betting and gaming is to a large extent ambiguous in policy and obscure in its working. The litigation has been enormous. The common law took one view of the matter, the Act of 1845 took another view. Sect. 2 of the Gaming Act, 1835, established one position. The Gaming Act, 1922, may establish another position, and so also with respect to others in the long line of statutes on the subject. The general drift of the statutes has been so far towards repression of betting and gaming, either by severe penalty or indirect discouragement.

(1) 2 Ex. 22.
(2) (1874) L. R. 10 Q. B. 102, 109.
(3) [1921] 2 K. B. 351.
(4) (1886) 18 Q. B. D. 276.

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The question of policy is for Parliament and not for the courts; it is a social rather than a legal question. There has been a vast increase of betting in recent years, which is not confined to any one section of the people. Whether betting be right or wrong is for the moralist to decide. The whole subject seems to call for the consideration of Parliament. Benefit rather than harm may result from a frank recognition and discussion of existing facts and the adoption of a considered policy. I cannot take isolated enactments as a key to the present object of the Legislature. The matters at issue on the point of policy involve far more than bets on horse races. Money to a huge extent is staked on events which range from football matches to aeroplane races. Betting on horses is a mere branch of the broader subject which includes, e.g., gaming at cards, lotteries and the constant hazard of money on every sort of contingency. The problem is grave, and the solution may be fraught with far-reaching social results. I need only say that I can get no clear view of general policy from this Act of 1922. I know not whether its object is to discourage betting or otherwise, nor whether it is meant for the benefit of the bookmaker or the backer. I see no basis of policy which assists the interpretation of the Act of 1922 with respect to the point before me. On the other hand I think it sound and just in this case to apply the long recognized and useful rule that vested rights are not to be deemed destroyed by a statute unless the enacting words are clear.

For the reasons given I am of opinion that judgment should be entered for the plaintiff for the 333*l.* with costs.

Judgment for plaintiff.

Solicitors for plaintiff: *J. B. & G. S. Burton.*

Solicitor for defendant: *Geo. A. Herbert, for Arthur Willey, Leeds.*

W. L. L. B.

1923
March 12,
13, 27.

KURSELL *v.* TIMBER OPERATORS AND CONTRACTORS, LIMITED.

Arbitration—Submission by Consent out of Court—Power of Arbitrator to order Affidavit of Documents—Power of Arbitrator to order Answers to Interrogatories—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *s.* 2, *First Schedule, clause* (*f*).

In a reference by consent out of Court under the Arbitration Act, 1889, the arbitrator has jurisdiction to order either party to make discovery of documents or to answer interrogatories on oath, by virtue of clause (*f*) of the First Schedule to the Act, which provides (after certain express directions) that the parties shall "do all other things which during the reference the arbitrators or umpire may require."

Special Case stated under the Arbitration Act, 1889, s. 19.

By a submission in writing out of Court dated November 30, 1921, a sole arbitrator was appointed in respect of disputes and differences between the parties arising under an agreement dated September 10, 1920, for the sale of certain timber by the claimants to the respondents.

After points of claim, defence and reply had been delivered and lists of documents exchanged, the claimants applied to the arbitrator to direct that the respondents should make an affidavit of documents in the form and with the particulars provided by the orders and rules of the High Court as to the subject matter of the arbitration. They also asked for an order that the respondents should answer on oath certain interrogatories. The respondents objected that the arbitrator had no jurisdiction to give such directions, and the arbitrator upheld this objection. At the request of the claimants the arbitrator stated the following questions in the form of a special case for the opinion of the Court—(*a*) Whether the arbitrator had jurisdiction to direct a party to the arbitration to make an affidavit of documents, and (*b*) whether he had jurisdiction to order a party to answer interrogatories on oath.

The Arbitration Act, 1889, First Schedule, clause (*f*), provides: "The parties to the reference and all persons claiming through them respectively shall subject to any legal

objection . . . . produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents in their possession or power respectively which may be required or called for, and do all other things which during the proceedings in the reference the arbitrators or umpire may require."

Barrington-Ward K.C. and *E. F. Spence* for the claimants. The Arbitration Act, 1889, s. 1, provides that a submission " shall have the same effect in all respects as if it had been made an order of Court." To understand the effect of this section reference must be made to previous legislation. By 9 & 10 Will. 3, c. 15 (1698), a submission could be made a rule of Court. By 3 & 4 Will. 4, c. 42, s. 39, if the agreement between the parties provided that the submission should be irrevocable it was irrevocable except by leave of the Court, and ss. 40 and 41 empowered the arbitrator to compel the attendance of witnesses and to administer oaths. By the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 17, either party could make a submission irrevocable by applying to the Court to make it a rule of Court, except where the agreement or the submission itself excluded that right.

Courts of equity were formerly reluctant to assist domestic forums: *Wellington* v. *Mackintosh* (1); *Street* v. *Rigby*. (2) The dictum of Lord Eldon to this effect in *Street* v. *Rigby* (2) has no application to the case of a compulsory arbitration, where the Courts would entertain a bill for discovery, and this jurisdiction was not affected by the powers in the Common Law Procedure Act, 1854, s. 7, to compel discovery independently of Courts of equity: *British Empire Shipping Co.* v. *Somes*. (3) At common law there was no power to direct discovery of documents and a submission to arbitration which was made a rule of Court under the Common Law Procedure Act, 1854, s. 17, was not within the provisions of s. 50 of that Act as to discovery: *In re Anglo-Austrian*

(1) (1743) 2 Atk. 569. (2) (1802) 6 Ves. 815, 821.
(3) (1857) 3 K. & J. 433.

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Bank. (1) In *Penrice* v. *Williams* (2) it was held that the whole jurisdiction as to discovery was vested in the arbitrator. That decision is directly in favour of the applicants, although in *In re La Société les Affréteurs Réunis and the Shipping Controller* (3) it was distinguished by Darling J. on the ground that it depended entirely upon the terms of the order in that case, while Greer J. expressed the opinion that the power to order discovery either by way of an affidavit of documents or by way of an affidavit in answer to interrogatories was not conferred on the arbitrator by the Arbitration Act, 1889, First Schedule, clause (*f*). In *Sutton* v. *Great Northern Ry. Co.* (4) Cozens-Hardy M.R. said: "I find nothing in the Act"—the Workmen's Compensation Act, 1906—"empowering the statutory arbitrator to do that which no arbitrator can do, that is, make an order for discovery or an answer to interrogatories"; but those words are dicta only.

Clauson K.C. and *D. N. Pritt* for the respondents. Prior to 1854 the Courts of common law had no power to order discovery in a consensual arbitration. The Arbitration Act, 1889, First Schedule, clause (*f*), gave a limited jurisdiction to arbitrators—namely, to administer the oath to witnesses and interrogate them. The parties interrogated may not use the answers for their own purposes. The words of clause (*f*) must have some limitations; thus in a consensual arbitration the arbitrator has no power to make an order for security of costs: *In re Unione Stearinerie Lanza and Wiener.* (5) It is doubtful whether a commissioner of oaths can administer oaths for the purpose of a consensual arbitration and it is a question whether such an arbitration is included in the words "court or matter" in the Commissioners for Oaths Act, 1889, s. 1. The powers of a referee with respect to discovery and production of documents (R. S. C., Order XXXVI., r. 50) are imported by r. 55 (*c*), "where any cause or matter or any question or issue of fact therein is referred to an officer of the

(1) (1864) 10 L. T. 369.
(2) (1883) 23 Ch. D. 353.
(3) [1921] 3 K. B. 1, 21, 22.
(4) [1909] 2 K. B. 791, 794.
(5) [1917] 2 K. B. 558.

Court or to a special referee or arbitrator." These rules were made prior to the Arbitration Act, 1889.

[SALTER J. What is the meaning, in clause (*f*) of the First Schedule to the Act, of the words "which may be required or called for"?]

They impose on the parties the duty of preparing points of claim and defence. Clause (*f*) only relates to matters coming before the arbitrator inside the arbitration chamber. In a consensual, as distinct from a non-consensual arbitration, there is no power to administer oaths to enable the parties to prepare their case.

Between the Judicature Act, 1883, and the Arbitration Act, 1889, the jurisdiction of certain arbitrators was extended. That assists the view that the general words in clause (*f*) cannot have the wide meaning attributed to them. The powers there given to the arbitrator are only to take the necessary steps to inform his mind on the issue which he has to try; neither an affidavit of documents nor answers to interrogatories filed by a party to the arbitration will necessarily assist him, for the documents and the answers may never be produced before him in evidence.

Barrington-Ward K.C. in reply. The words of the Arbitration Act, 1889, s. 2, show that a wide construction should be given to the meaning of the First Schedule, clause (*f*). There is no authority on this particular point, but in *Barnett* v. *Aldridge Colliery Co.* (1) it was held that an arbitrator in a reference had power to order an inspection of property.

Cur. adv. vult.

March 27. SALTER J. delivered the judgment of the Court. This is a Special Case stated for the opinion of the Court under s. 19 of the Arbitration Act, 1889. The case is stated by a sole arbitrator in a reference by consent out of Court under that Act. It must be assumed that the submission, which is in writing, modifies neither the powers given to an arbitrator by that Act nor the terms of submission set out in the First

(1) (1887) 4 Times L. R. 16.

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Schedule. The questions addressed to the Court are as follows: "(1.) Whether I have jurisdiction as sole arbitrator acting under the said submission to direct that a party to the arbitration should make an affidavit of documents as to the subject matter of the arbitration. (2.) Whether I have jurisdiction as sole arbitrator acting under the said submission to direct that a party to the arbitration should answer interrogatories on oath."

It is necessary to consider first whether these powers, or either of them, can be lawfully vested in a consensual arbitrator by the agreement of the parties. The powers of such an arbitrator depend entirely on the contract. Every power given to him by the Arbitration Act is subject to the agreement of the parties. It is clear that any power sought to be conferred must be of a kind to aid the tribunal. It is equally clear that the parties cannot vest in an arbitrator powers which only a judge can exercise. They cannot, for example, give him power to commit for contempt: *In re Unione Stearinerie Lanza and Wiener* (1); or to order the issue of a writ of habeas corpus ad testificandum. It may be that an express agreement that the arbitrator should be at liberty, if he thought fit, to delegate his functions, in whole or in part, to a person chosen by himself would be inoperative. But if the power is not inconsistent with the complete discharge by the arbitrator of his functions, if it is of a kind to aid him in such discharge, and is not of a kind which only a judge can use, it seems difficult, in principle, to say that the parties may not give their arbitrator any powers they please, where those powers affect only themselves. Some other principle must be sought when the powers affect witnesses or other persons who are no parties to the dispute, nor to the submission, nor to the choice of arbitrator. It is enough to say, for the purposes of this case, that we are quite satisfied that power to order the parties to make discovery of documents and to answer interrogatories on oath can be given to an arbitrator by the agreement of the parties. Such powers assist the tribunal and their exercise affects the parties only.

(1) [1917] 2 K. B. 558, 562.

We were referred to an observation of Cozens-Hardy M.R. in *Sutton* v. *Great Northern Ry. Co.* (1) In that case the Court of Appeal decided that a county court judge, sitting as an arbitrator to hear an application for compensation under the Workmen's Compensation Act, 1906, has no power to order discovery or interrogatories. In the course of his judgment in that case the Master of the Rolls said: "... I go back to the Act itself, and I find nothing in the Act empowering the statutory arbitrator to do that which no arbitrator can do, that is, make an order for discovery or an answer to interrogatories." The observation that no arbitrator can order discovery or interrogatories was unnecessary to the decision of that case, and no such observation was made by the other members of the Court. The Master of the Rolls may have been thinking of the powers of an arbitrator under the Act which he was considering. But if the observation is to be taken to mean that a sole arbitrator in a reference by consent out of Court under the Arbitration Act, 1889, has no power to order discovery or interrogatories, although authorized to do so by the express terms of the written submission, we are unable, with great respect, to agree with it.

It remains, therefore, to consider whether the form of submission contained in the First Schedule to the Arbitration Act implies an agreement by the parties that the arbitrator shall have these powers, or either of them, or whether it is still necessary for the parties to confer these powers in express terms in the submission if they desire the arbitrator to have them. The answer depends on the construction of clause (*f*) of the First Schedule, which is as follows: "The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire, all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which during the

(1) [1909] 2 K. B. 791, 794.

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proceedings on the reference the arbitrator or umpire may require."

This clause consists of three parts. The first binds the parties to submit to be examined on oath by the arbitrator. This obviously includes a duty to submit to be examined by the other party in the presence and for the information of the arbitrator. It may be doubted whether these words, standing alone, bind a party to answer interrogatories put to him by the other party in advance of the hearing, seeing that none of the answers may even be known to the arbitrator. The second part of clause (*f*) pledges the parties, subject to legal objection, to produce before the arbitrator all documents which may be called for. These words bind the parties to produce before the arbitrator any documents he may call for, and probably any documents the other party may call for. It may be arguable whether these words, standing alone, would entitle an arbitrator to call on a party to produce before him, or would entitle one party to call on the other to produce before the arbitrator, all documents which the party called on might consider relevant. It may be that, under these words, the demand must be limited to named documents. Certainly they do not bind either party to produce any documents to the other party except before the arbitrator. These words alone obviously give no power to order interrogatories and it may be doubted if they give power to order discovery. They appear to derive from the common law practice relating to production and inspection of named documents, rather than from the Chancery practice of discovery, which put the parties on their conscience to disclose their relevant documents to one another in advance of the hearing. In *Penrice* v. *Williams* (1), a case decided before the Arbitration Act, 1889, a consent order had been made referring an action and all matters in difference to the award of a named arbitrator. The order provided that the arbitrator might, if he thought fit, examine the parties and their witnesses on oath and that the parties should produce before the arbitrator the pleadings in the action and all books, deeds,

(1) 23 Ch. D. 353, 356.

papers, and writings in their or either of their custody or power relating to the matters in difference. During the pendency of the arbitration the plaintiff applied by summons in the action under the Rules of 1875 for an affidavit of documents. Chitty J. dismissed the summons on two grounds: (1.) that the Court no longer had seisin of the matter; (2.) that the application should have been made to the arbitrator. The judgment on the second point is as follows: "There is also a further objection taken by the defendants, that the parties having, as is shown on the face of the order itself, themselves agreed to place the whole jurisdiction with reference to discovery in the hands of the arbitrator, it was open to the plaintiff to have made an application to the arbitrator, which he has not done. I am of opinion that this latter objection is also fatal. I therefore hold that on either of the two objections, independently of each other, the application must be refused." The learned judge does not say, but he appears to imply, that in his opinion the arbitrator would have had power, if he thought fit, to order discovery. He cites authority on the first point, but none on the second. It may perhaps be doubted whether, on the terms of the order in that case, the arbitrator had power to order discovery, as distinguished from production and inspection, but it is not necessary to decide this point. If he had such power, it would seem to follow that, in the present case, the arbitrator has power to order discovery under the second part of clause (*f*) without reliance on the concluding words of that clause, and that the concluding words have therefore no reference to discovery.

In our opinion, if it is to be held that an arbitrator in a reference by consent out of Court under the Arbitration Act, 1889, has power to order discovery and interrogatories, it is on the third and concluding part of clause (*f*) that reliance must be mainly placed, both as to discovery and interrogatories. The words are, "and do all other things which during the proceedings on the reference the arbitrators or umpire may require." As regards interrogatories, these words must be read as supplementing the first part of clause (*f*), which deals with

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oral evidence by parties; as regards discovery, they must be read as supplementing the second part of clause (*f*), which deals, at any rate, with production or inspection of documents. It is difficult to imagine wider words, or words which, placed where they are, show a clearer intention on the part of the Legislature to impose on parties to consensual arbitrations the widest possible duty of frank and loyal co-operation with the tribunal. These words have been considered in three recent cases. In *In re Crighton and Law Car and General Insurance Corporation* (1) it was assumed that an arbitrator under a submission in the statutory form has power to order pleadings, and it was decided that he has a discretion to allow or disallow amendments. If the arbitrator has power to require the parties to define the issues by means of pleadings, and has also power to put the parties on oath, it is difficult to see on what principle he has not power to require them to define the issues in a more effectual manner by answering interrogatories. In the case of *In re Unione Stearinerie Lanza and Wiener* (2) it was decided that an arbitrator under a submission in the statutory form has no power to order security for costs. Lord Reading C.J. observed that the power could have been given to the arbitrator by express agreement between the parties. In the course of his judgment he considered the scope and meaning of the concluding words of clause (*f*) and made the following observations upon them: "The words in clause (*f*) of the First Schedule, upon which reliance was mainly placed, do not give the power to order a stay of proceedings pending the giving of security for costs. They are words of general import giving to the arbitrator the power to do anything which he may require for the purpose of ascertaining facts or law in order that he may decide the dispute. It would be a very wide extension of them to construe them as meaning that he has the powers of a judge as to staying proceedings pending the giving of security for costs. I do not think that would be a reasonable construction of the language of the clause. Obviously the words cannot mean that an arbitrator has all the powers of a judge

(1) [1910] 2 K. B. 738. (2) [1917] 2 K. B. 558, 561.

because in that case he would have the power to commit for contempt of Court in his presence and to issue a writ of attachment for default in compliance with an order made by him. It is not contended that an arbitrator has any such powers, and it is quite clear that he has not. Consequently it is apparent that the words of clause (*f*) cannot be read as if they give the arbitrator the power of a judge, and they must therefore be read subject to some limitation, and that limitation is that the arbitrator may order the parties to do all such things as he may require in order to assist him in arriving at a determination of the dispute." *In re La Société les Affréteurs Réunis and the Shipping Controller* (1) was a case of discovery against the Crown and turned on the rights of the Crown, but Greer J. expressly reserved his opinion on the two questions that now arise.

In our opinion powers to order discovery and interrogatories fall within the meaning of the concluding words of clause (*f*) as construed by Lord Reading L.C.J. in the passage above cited. Mr. Clauson, in the course of an able argument, urged that discovery and interrogatories inform the parties and not the tribunal, since the documents discovered may not be put in evidence, and the answers obtained cannot be used by the party answering and may not be used by the party interrogating. The point is unsubstantial for the present purpose. Both discovery and interrogatories, when properly employed, are of value to a tribunal. They help an arbitrator to determine the dispute with less expenditure of time and money. The words "subject to any legal objection" qualify every part of clause (*f*): *In re La Société les Affréteurs Réunis and the Shipping Controller.* (1) The party making discovery or answering interrogatories has the same right of objection as he would have in an action.

In modern times Parliament has shown a constantly increasing desire to aid and encourage private arbitration. We think that our decision is in accordance with the letter and spirit of the Arbitration Act, 1889, when read in the

(1) [1921] 3 K. B. 1.

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light of the earlier statutes regulating arbitration, which it repeals and supersedes.

Both the questions addressed to the Court must be answered in the affirmative.

Solicitors for claimants: *Bull & Bull.*

Solicitors for respondents: *Laurence Jones & Co.*

F. P. F.

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March 8, 9, 23.

[IN THE COURT OF APPEAL.]

MANTON *v.* BROCKLEBANK.

Negligence—Cattle Trespass—Land and Goods—Horse not a dangerous Animal—Horses in Field—One injured by the Other.

Trespass to person or goods by an animal in which there is at common law a valuable property, such as horses and cattle, does not generally render its owner liable.

Cox v. *Burbidge* (1863) 13 C. B. (N. S.) 430 followed.

Dictum of Holt C.J. and Turton J. in *Mason* v. *Keeling* (1699), as reported in 12 Mod. 332, 335, not followed.

Dictum of Blackburn J. in *Fletcher* v. *Rylands* (1866) L. R. 1 Ex. 265, 280 distinguished.

The defendant put a mare into a field in which there was a horse belonging to the plaintiff without notifying the plaintiff. The mare kicked the horse, which had to be destroyed. No scienter was proved in the defendant, but it was found by the deputy county court judge that the propensity of horses running loose to injure one another in sport or quarrel was common knowledge:—

Held, First, that the mare was not within the class of dangerous animals which the owner must keep at his peril according to the rule in *Fletcher* v. *Rylands* (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330.

Secondly, that the defendant was entitled to assume that the mare, being mansuetæ naturæ, was an innocent animal, and, having no notice of any fact indicating the contrary, was not under any duty towards the plaintiff to give notice of his intention to place the mare in the field, or to have a person on the watch or in charge of her. And on the whole that the defendant was not liable either for breach of an absolute duty or for negligence.

Hudson v. *Roberts* (1851) 6 Ex. 697; *Lee* v. *Riley* (1865) 18 C. B. (N. S.) 722; *Ellis* v. *Loftus Iron Co.* (1874) L. R. 10 C. P. 10 distinguished.

Decision of Divisional Court [1923] 1 K. B. 406 reversed.

APPEAL from the decision of a Divisional Court (Darling

and Salter JJ.) (1) dismissing an appeal from the deputy judge of the county court at Kingston-upon-Hull.

The plaintiff, Mrs. Sarah Manton, had been accustomed to put her horse "Prince" to agistment in a field belonging to a Mr. Shillito, and it was there on October 9 and 10, 1921. On October 8 the defendant's son, Arthur Brocklebank, on behalf of the defendant, George Brocklebank, obtained Mr. Shillito's consent to put a mare into the same field for agistment. The defendant had on October 6 agreed to purchase the mare, which was fourteen years old, from a Mr. Buffey on a warranty that she was quiet, but had her on approval for three weeks. On October 9 the mare was placed in the field without any notification to the plaintiff, although in the circumstances there would have been no difficulty in seeing him, and on October 10 "Prince" was found with a broken off foreleg, which the deputy county court judge found had been caused by a kick from the mare, and it had to be destroyed. Neither the horse nor the mare had had its shoes removed, both being in daily work. There was evidence that at the time the injury was discovered the mare was running about the field with her ears back, switching her tail and showing the whites of her eyes. There was also evidence that on two previous occasions when fresh horses were put into this field the plaintiff had been notified, and had watched them for a short time to see how they behaved.

The deputy county court judge found as facts that he was not satisfied that there was a custom before turning a horse out to grass, either to take off its shoes or give notice to the owners of other horses already in the field, though he thought it might be prudent to do so. He also held that there was no scienter as to the mare's character in the defendant. He held as a matter of law that when a horse is turned out to grass loose and uncontrolled among other strange horses, and injures one of them, it is not necessary for the owner of the injured animal to prove scienter, it being natural to all horses in such circumstances to kick and bite

(1) [1923] 1 K. B. 406.

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each other in play as well as in quarrel, and he referred to *Lee* v. *Riley*. (1) He also found that if the mere non-giving of notice was negligence, the defendant had been guilty of negligence. He accordingly gave judgment for the plaintiff for 49*l*. On appeal the judgment of the deputy county court judge was affirmed by the Divisional Court; by Darling J., on the ground that, the deputy county court judge having found that the propensity of horses running loose to injure one another in sport or quarrel was common knowledge, the defendant having this knowledge was negligent in not notifying the plaintiff; by Salter J., on the ground that the mare must, in such circumstances as the present, be classed among animals feræ naturæ, and that as the defendant had knowledge of the mare's characteristics as being matter of common knowledge, he was liable in trespass.

The defendant appealed. The appeal was heard on March 8 and 9, 1923.

Sir Malcolm Macnaghten K.C. and *D. N. Pritt* for the appellant.

J. B. Matthews K.C. and *van den Berg* for the respondent.

Cur. adv. vult.

The arguments fully appear from the judgments.

[The following authorities were referred to: *Gaunt* v. *Smith* (2); *Lee* v. *Riley* (3); *Ellis* v. *Loftus Iron Co.* (4); *Jackson* v. *Smithson* (5); *Barnes* v. *Chapin* (6); *Lujoko* v. *Symmonds* (7); *Blackman* v. *Simmons* (8); *Cooke* v. *Waring* (9); *Daubney* v. *Cooper* (10); *Read* v. *Edwards* (11); *Heath's Garage, Ld.* v. *Hodges* (12); *Fletcher* v. *Rylands* (13); S. C. on appeal sub nom. *Rylands* v. *Fletcher* (14); *Tillett* v.

(1) 18 C. B. (N. S.) 722.
(2) Unreported. Cited in Oliphant's Law of Horses, 5th ed., p. 225.
(3) 18 C. B. (N. S.) 722.
(4) L. R. 10 C. P. 10.
(5) (1846) 15 M. & W. 563.
(6) (1862) 86 Mass. 444.
(7) (1911) 32 Natal L. R. 326.
(8) (1827) 3 C. & P. 138.
(9) (1863) 2 H. & C. 332.
(10) (1820) 10 B. & C. 830.
(11) (1864) 17 C. B. (N. S.) 245.
(12) [1916] 1 K. B. 206; [1916] 2 K. B. 370.
(13) L. R. 1 Ex. 265.
(14) L. R. 3 H. L. 330.

Ward (1); *Hammack* v. *White* (2); *Manzoni* v. *Douglas* (3); *Theyer* v. *Purnell* (4); *Anderson* v. *Buckton* (5); *Scetchet* v. *Eltham* (6); *Cox* v. *Burbidge* (7); *Hudson* v. *Roberts* (8); *Bradley* v. *Wallaces, Ld.* (9); *Jones* v. *Lee* (10); *Hadwell* v. *Righton* (11); *Turner* v. *Coates* (12); *Mason* v. *Keeling* (13); *Card* v. *Case* (14); *Higgins* v. *Searle* (15); *Holmes* v. *Mather* (16); *Stanley* v. *Powell* (17); Bullen and Leake's Precedents of Pleading, 3rd ed., p. 366; Roll. Abr., vol. ii., p. 564; Halsbury's Laws of England, vol. i., p. 395; Comyn's Dig. Trespass C. 1, p. 539; Addison on Torts, 6th ed., p. 128; Clerk and Lindsell on Torts, 4th ed., p. 445; Wallace on the Reporters, pp. 389, 401.]

March 23. The following written judgments were delivered :—

LORD STERNDALE M.R. This appeal from the judgment of a Divisional Court (Darling and Salter JJ.) affirming a decision of the deputy county court judge of Hull raises a new question, rightly, I think, described by the learned judges as a difficult one.

The facts of the case are as follows. The plaintiff was the owner of a horse which she used in her business and when not working it was kept in a field belonging to a Mr. Shillito, in legal terms, agisted with him. There had been other horses in the same field, and just before the occurrence which gave rise to this action there was a horse of the defendant's described as a dark horse there which had been quite friendly with the plaintiff's horse. The defendant had bought or was negotiating a purchase of a black mare fourteen years old which had been warranted quiet. He had it sent to him on trial and made an agreement with Mr. Shillito for the

(1) (1882) 10 Q. B. D. 17.
(2) (1862) 11 C. B. (N. S.) 588.
(3) (1880) 6 Q. B. D. 145.
(4) [1918] 2 K. B. 333.
(5) (1719) 1 Stra. 192.
(6) (1681) 1 Freem. K. B. 534.
(7) 13 C. B. (N. S.) 430.
(8) 6 Ex. 697.
(9) [1913] 3 K. B. 629.
(10) (1911) 106 L. T. 123.
(11) [1907] 2 K. B. 345.
(12) [1917] 1 K. B. 670.
(13) 1 Ld. Raym. 606; 12 Mod. 332.
(14) (1848) 5 C. B. 622.
(15) (1909) 100 L. T. 280.
(16) (1875) L. R. 10 Ex. 261.
(17) [1891] 1 Q. B. 86.

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agistment of it in the same field as the plaintiff's horse. The matter was in the hands of the defendant's son, who had asked before taking it if it had been agisted before. The answer is not given in terms, but he said he acted on the vendor's representation, so presumably he was told that it had. When he put it into the field he said it seemed quite quiet and he left it grazing. On the next morning it was found that the mare had kicked the plaintiff's horse on the off foreleg above the knee and broken the leg in such a manner that the horse had to be shot. Both horses were shod because they were being worked: the plaintiff's horse had flat shoes while the defendant's mare had calkins—i.e., turned-up ends on at any rate one foot. I do not think the calkins are of any importance except that they helped to identify the shoe that caused the injury. The result of a kick with a flat shoe would in all probability have been the same, and there was no contention to the contrary and no finding that the calkins were wrong.

In these circumstances, the plaintiff sued the defendant for the loss of the horse, and, in answer to a request for particulars, gave the following: "The plaintiff is the owner of a horse which was agisted with a Mr. Shillito at Preston in Holderness, and on Sunday, October 9th, 1921, the defendant or his servant turned a mare into the field where the plaintiff's horse was running without any warning to the plaintiff and without first removing the shoes from the mare's hoofs with the result that the plaintiff's horse was kicked by the defendant's mare and so severely injured that it had to be destroyed the following day." No point was made of the allegation as to the shoes, and it would obviously be impracticable when a mare was being worked to take off her shoes every night and put them on again in the morning. The point however as to giving notice was pressed and was considered of importance by one of the learned judges. The deputy county court judge gave judgment for the plaintiff in these terms: "I hold (1.) as a fact, that the plaintiff's horse was kicked by the defendant's mare and so severely injured that it had to be destroyed. (2.) I was not satisfied that there

is a custom before turning out a horse to grass, i.e. agisting it, either to take off its shoes or to give notice to the owners of other horses already in the field, though it may be prudent to do so. (3.) I hold as a matter of law that when a horse is turned out to grass loose and uncontrolled amongst other strange horses and does injury to one of them, it is not necessary for the owner of the injured animal, in order to recover damages, to prove scienter, it being natural to all horses in such circumstances to kick and bite each other in play as well as in quarrel: *Lee* v. *Riley* (1), and therefore the plaintiff was entitled to recover against the owner of the animal doing the damage. (4.) If the mere non-giving of notice amount to negligence, then I hold that there was negligence. (5.) If it was necessary to prove scienter it was not proved." His finding as to negligence is not very illuminating. If there were a duty to give notice of course there was negligence, but there is no finding in fact or in law whether there was such a duty except that he finds there was no custom to give notice, and this is not conclusive as to the duty. The real ground of his judgment is in the third point, and this seems to me to be founded on the principle of *Fletcher* v. *Rylands* (2)—i.e., that in consequence of its being natural to all horses when turned into a field with other horses to kick and bite in play as well as in quarrel they are dangerous animals which the owner must keep at his peril. I think the finding as to the natural disposition of horses proceeds partly upon the evidence in the case and partly upon general knowledge such as the learned judge seemed to think was expressed in *Lee* v. *Riley*. (1) The only evidence actually given was one statement by the defendant's son, "Strange horses are apt to play about a bit," unless Mr. Shillito's evidence, "When you turn out animals to agist with others you run the risk of them being injured," though given with another intention, may be said to point indirectly in the same direction. I shall have to deal with the effect of this finding later. This judgment was affirmed by the Divisional Court. I am not sure that the learned judges proceeded upon quite the same

(1) 18 C. B. (N. S.) 722. (2) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

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grounds. Darling J. seems to have based his judgment chiefly upon the ground that in the circumstances it was negligent of the defendant not to give notice to the plaintiff that he was going to turn the mare into the field, though if he had turned her out on a large common where there were a number of horses there might have been no duty to do so. Salter J. appears to me to have founded his judgment, as I think the deputy county court judge did, upon the principle of *Fletcher* v. *Rylands*. (1) I think Darling J. would if he had thought it necessary have adopted the same ground, and he also relied upon the authority of *Ashby* v. *White* (2) as supporting his judgment. With respect, I cannot see the application of *Ashby* v. *White*. (2) I think here there was either a well-recognized right of action or none at all. The learned counsel for the respondent, however, took a much broader ground—i.e., that the owner of an animal in which there is a valuable property, such as horses and cattle, is responsible for the actions of that animal when they constitute a trespass to the goods of another person exactly in the same measure as if he had himself committed the trespass. "Qui facit per equum" or "equam" or "per bovem facit per se." Therefore, he argued, if the defendant's horse kicks the plaintiff's, the case is just the same as if the defendant had kicked it himself and produced the same results. This doctrine, he admitted, does not apply to animals in which there is not at common law a valuable property, e.g., those mentioned in Beven on Negligence, 3rd ed., vol. i., p. 525, as constituting an intermediate class: dogs, cats, squirrels, parrots, singing birds, etc. The learned counsel produced, I think, every relevant case (and I must say no irrelevant ones) beginning from a very early time. I think he began as some of the cases did with the book of Exodus, and one of the cases on this subject, *Card* v. *Case* (3), discusses the Mosaic law, the Athenian, the Roman, and the Code Civil. It must not be forgotten, however, that we are dealing with the English common law, and that these other systems of jurisprudence

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

(2) (1703) 2 Ld. Raym. 938.

(3) 5 C. B. 622.

are relevant only so far as they throw light on our law. It is admitted that there is no decision that establishes this proposition. I think I am right in saying that we were referred to only one dictum, and that a doubtful one, which in any way supports it: we were referred to a passage in Blackburn J.'s judgment in *Fletcher* v. *Rylands* (1), which divorced from its context may seem quite wide enough to give some support to the argument, but when read with its context clearly has no relation to this question at all. The one dictum that may support it is that of Holt C.J. and Turton J. in *Mason* v. *Keeling* (2), as follows: "If it had been said, that the defendant knew the dog to be ferox, I should think it enough. The difference is between things in which the party has a valuable property, for he shall answer for all damages done by them; but of things in which he has no valuable property, if they are such as are naturally mischievous in their kind, he shall answer for hurt done by them without any notice; but if they are of a tame nature, there must be notice of the ill quality." It is, however, unfortunate that in the report of the same case in 1 Ld. Raym. (3), the dictum is differently reported, and puts the duty as one only to take reasonable care, which is a very different duty. It is as follows: "Per Holt, Chief Justice and Turton, Justice, the declaration is ill for want of shewing that the defendant had notice, that the dog was fierce. For there is a great difference between horses and oxen, in which a man has a valuable property, and which are not so familiar to mankind, and dogs; the former the owner ought to confine, and take all reasonable caution, that they do no mischief, otherwise an action will lie against him." And then the judgment proceeds as in the Modern Reports. According to Wallace on the Reporters, neither of these reports is of great authority, but as I think Lord Raymond was the Raymond who argued the case, the latter is probably to be preferred. At any rate it is remarkable that if this argument be correct, there is during the whole history of the English law nothing but one very doubtful

(1) L. R. 1 Ex. 265, 280. (2) 12 Mod. 332, 335.
(3) 1 Ld. Raym. 606, 608.

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dictum to be found which in any way supports it. Some American and Colonial judgments were cited to us which, as mentioned in digests or text books, seem possibly to support the contention; but when the reports themselves are examined it is clear that they do not afford such support. In my opinion, moreover, it is opposed to the whole current of decisions, and so far as such animals are concerned makes the whole distinction between animals feræ naturæ and animals mansuetæ naturæ absolutely idle in a case of direct trespass to goods. If it be sound, it must be immaterial whether the trespass is according to the ordinary nature of the animal or results from vice, the liability is the same as if the owner committed the trespass himself and the disposition of the animal in doing it is irrelevant. Again, if it be sound an action would have lain on the facts in *Tillett* v. *Ward* (1); in *Hammack* v. *White* (2); in *Manzoni* v. *Douglas*. (3) I accept the contention of the learned counsel that these cases are not direct authorities against him because in none of them was the action brought for the direct trespass to goods; they all were founded on other alleged causes of action, generally on the case; but it is odd that if such a simple cause of action did exist none of them was brought upon it, and in none of them and in no case cited to us is there any expression of opinion by any of the judges that the plaintiff really had a simpler cause of action and had only destroyed his remedy by choosing to sue in the wrong form. Moreover some of them, at any rate, were decided after powers of amendment had been conferred on the Courts, and the matter, if it rested only on the form of action, could have been put right. The learned counsel also tried to distinguish these cases on the ground that they happened on the highway where the plaintiff had a right to bring his animal, but I cannot see that such a fact is relevant. The respondent's contention is that a trespass to goods by the animal is the same thing so far as concerns liability as a trespass by the owner, and the owner has no more right to commit such a trespass on the

(1) 10 Q. B. D. 17. (2) 11 C. B. (N. S.) 588.
(3) 6 Q. B. D. 145.

highway than he has anywhere else. I can see no ground on principle or authority for the contention, and I think it must fail.

There is, however, another contention adopted by Salter J., and I am inclined to think by Darling J. also, which seems to me to present more difficulty. It is that the case falls within the principle of *Fletcher* v. *Rylands* (1) and that the defendant is liable on that principle. This is grounded on the finding of the deputy county court judge which I have already read—i.e., that it is natural in all horses in such circumstances to kick and bite each other in play as well as in quarrel. I have already alluded to the only evidence which is to be found in the judge's notes on the subject, and I cannot see that there was any evidence given at the trial to support such a broad proposition. The learned deputy county court judge however refers to *Lee* v. *Riley* (2) as supporting that proposition. I do not see that any such statement of fact was made by any of the judges who decided that case. What they decided was that if the defendant's horse was trespassing and so giving a cause of action to the plaintiff, the act of the horse in kicking another was not so alien to horse nature as to make the resulting damage too remote to be recovered. This was also the decision in *Ellis* v. *Loftus Iron Co.* (3), and neither of these cases seems to me to establish the proposition of fact stated by the deputy county court judge. I assume, however, that he acted, as did Darling and Salter JJ., upon common knowledge of which the Court must take notice. With respect, I think this is rather dangerous. There may be facts of such public notoriety that a Court is bound to take notice of them, but the experience of different judges may well lead them to different conclusions as to the habits of horses, and I do not rely on any experience of my own.

Turning to the evidence in this case, it appears that the plaintiff's horse had been agisted with other horses in the same field without injury, that the same was true of the defendant's mare, and that the plaintiff knew that other

(1) L. R. 1 Ex. 265 ; L. R. 3 H. L. 330.

(2) 18 C. B. (N. S.) 722.

(3) L. R. 10 C. P. 10.

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horses were very likely to be agisted in the same field as hers. There was evidence also that horses belonging to different owners often run loose in the same field and must at one time have been strange to one another. It seems to me that no more is established than that this biting and kicking is a thing that may or may not occur and is not contrary to horse nature. The question is whether this is enough to put the owner of a mare fourteen years old, warranted quiet and known to have been previously agisted in company with other horses, in the same position as the owner of what the learned counsel called the judicial pet, i.e., a tiger, in the sense that he is responsible in any case for its actions, though there be on his part no negligence and no knowledge of any tendency of the kind in that particular animal. So to hold seems to me in effect to nullify most of the doctrine distinguishing animals mansuetæ naturæ from those feræ naturæ. It is not confined to horses but would apply to other animals, and for the purposes of this contention there is no difference between animals in which there is a valuable property and the other class to which I have already referred. In the same way it might be said to be quite consonant with dog nature to run after sheep though all dogs do not do so, but no dog owner has been made liable in the absence of scienter; in fact, I think there are decisions to the contrary.

I do not think there is any ground for bringing this mare within the class of dangerous animals which the owner must keep at his peril. There is no decision affirming such a liability in English law, though the liability of owners of different kinds of animals has been the subject of discussion for centuries, and I think I can show that there are several cases in which if it had existed it could not have escaped recognition.

I think the most striking case is *Ellis* v. *Loftus Iron Co.* (1) The county court judge there had given a judgment for the plaintiff on the ground of negligence. The Court of Common Pleas upheld the judgment not on that ground, for they had doubts about it, but upon a very narrow and technical ground

(1) L. R. 10 C. P. 10.

of trespass, i.e., by the protrusion of the animal's head over the fence dividing the two fields, so encroaching on the column of air to which the plaintiff was entitled usque ad cœlum. This was a case also of stallions and mares where mischief might be more anticipated than in ordinary cases of animals. If there had been any ground for the contention now advanced the whole discussion as to negligence or trespass would have been idle and the defendant's case would not have been arguable. The same observation is true with regard to *Lee* v. *Riley* (1) and *Hudson* v. *Roberts*. (2) The question of trespass in the one case and scienter in the other would have been quite irrelevant and the defendant's liability would have been plain. As I have before pointed out, when a cause of action, whether in trespass or negligence, has once been established, the defendant may well be liable for any damage produced by acts not alien to the nature of the animal and cannot say such damage is too remote. This, however, does not lead to the conclusion that such acts constitute a cause of action in themselves when the animal is lawfully in the place where it is either by legal right or as here by contract. I think the facts of this case do not bring it within the principle of *Fletcher* v. *Rylands* (3) and do not establish any liability on that ground upon the defendant.

Darling J. however has also based his judgment upon the ground of negligence in not giving notice to the plaintiff that his mare would be put in the field. In the first place there is no finding of negligence on this head by the deputy county court judge except the ambiguous one I have already mentioned. But I think the considerations with which I have already dealt show that there was no duty to give such notice. If the defendant was entitled to assume as I think he was that the mare being mansuetæ naturæ was prima facie an innocent animal and no facts pointing to her being otherwise had come to his notice, I can see no reason for his giving notice that he was going to put her into the field. I observe that the learned judge only considers a qualified

(1) 18 C. B. (N. S.) 722.
(2) 6 Ex. 697.
(3) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

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duty to be established, a duty to give notice where it is easy and convenient, not where it is difficult, as in the case of a horse turned out on a large common. I do not myself see the difference in principle, but I do not think the duty exists in either case.

I think it might be contended that the plaintiff having put her horse into a field where she knew that other horses would also be agisted took the risk of what might happen in the circumstances, and this was the meaning of the evidence of Mr. Shillito to which I have already alluded. This would seem to be so especially on the assumption made by the learned judges that such occurrence as took place in this case was the normal result of other horses being turned into the field, and therefore known to the plaintiff as to the rest of the world. I prefer however not to base my judgment on this ground.

I think I ought to mention a contention of one of the learned counsel for the respondent to the effect that if their contentions of law were not accepted there ought to be a new trial on the ground that the mare was in fact vicious. There was some evidence on which this could be found and some to the contrary, but if the fact were relevant without proof of scienter, I think that the deputy county court judge should have been asked for a finding on the point, and he was not. I think we should keep strictly to the rule that if a point be not taken at the trial, especially one involving a finding of fact, it cannot afterwards be taken. No doubt the judge was asked to find scienter which would involve finding that the mare was vicious, for the defendant could not know of a vice which did not exist; but when he found there was no scienter no one asked him to find the fact of vice, probably because it was thought (I do not say wrongly) irrelevant. The learned counsel however went further and said there was evidence that the defendant suspected the mare was vicious as he took a warranty that she was quiet. I am not sure that I follow the reasoning, but in any event if the argument goes to anything it goes to scienter, and as I have said that has been negatived.

I think the appeal should be allowed and judgment entered for the defendant with costs here and below.

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WARRINGTON L.J. [after recapitulating the facts and the decision below]. The material circumstances are in my opinion as follows. The defendant had a right to place the mare in the field. There was in my opinion, with all respect to Darling J., no breach of any duty towards the plaintiff in failing to give notice of his intention to place the mare in the field or to have a person on the watch or in charge, and there was therefore no negligence on his part. Knowledge of any vicious propensity in the mare was not proved. Such cases as *Lee* v. *Riley* (1) and *Ellis* v. *Loftus Iron Co.* (2) are not in point. The cause of action in each case was trespass quare clausum fregit, and this being established the further question arose whether the injury to the plaintiff's horse in his close was the natural consequence of the trespass and therefore one for which damages could be recovered. This last point was decided in the plaintiff's favour, it being thought by the Court that horses there meeting may naturally either in sport or in quarrel do injury one to the other.

But Mr. Matthews for the plaintiff contended that the mere ownership of the animal which did the injury, being an animal in which the law recognizes a valuable property, is sufficient without more to render the defendant liable for the consequences. In my opinion this contention cannot be supported. The horse belongs to a class of animals "which" (to use the words of Bowen L.J. in *Filburn* v. *People's Palace and Aquarium Co.* (3)) "according to the experience of mankind, is not dangerous, and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal that he keeps is likely to do mischief." If the proposition put forward by Mr. Matthews were good law, I can see no occasion for the

(1) 18 C. B. (N. S.) 722. (2) L. R. 10 C. P. 10.
(3) (1890) 25 Q. B. D. 258, 261.

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discussion which took place in *Lee* v. *Riley* (1) and *Ellis* v. *Loftus Iron Co.* (2) and in other cases of the same nature, nor for the consideration in *Filburn* v. *People's Palace and Aquarium Co.* (3) of the question whether an elephant could be held to be within the class of animals referred to by Bowen L.J., inasmuch as even if it were the owner would, according to the contention in question, still be liable. Moreover *Cox* v. *Burbidge* (4) must I think have been decided the other way, for I can see no distinction for this purpose between injury to the person and injury to goods. I am satisfied that by English law the mere possession of an animal of the class usually described as mansuetæ naturæ does not render the owner liable for injuries done by it to the person or to goods. In this respect our law apparently differs from the Roman law and from the Code Napoleon: see the note to *Card* v. *Case.* (5)

Where as in the present case there is no trespass and the plaintiff's claim is founded solely on the injury done to his horse by that of the defendant, the horse being one of the class of animals described by Bowen L.J. as not dangerous and likely to do mischief, it is essential to the cause of action that it be proved that the defendant has actual knowledge that the particular animal has vicious or dangerous qualities. This is well illustrated by *Cox* v. *Burbidge.* (6) In that case, although the defendant's horse was in fact trespassing or was assumed so to be, the action was not founded on the trespass, the plaintiff being a member of the public having no right of action in that respect. The decision in the defendant's favour was clearly founded on the absence of any knowledge on the defendant's part that the animal in question was of such a disposition as to be likely to kick: see particularly the judgment of Willes J.

But it is contended—and this contention was accepted by the judges in the Courts below—that the propensity of horses turned out together to do an injury to each other either in

(1) 18 C.B. (N.S.) 722.
(2) L. R. 10 C. P. 10.
(3) 25 Q. B. D. 258.
(4) 13 C. B. (N. S.) 430.
(5) 5 C. B. 622, 627.
(6) 13 C. B. (N. S.) 430, 439.

sport or quarrel is so well known as to remove them under such circumstances from the class of animals regarded as not dangerous, and thus to render their owners liable for any such injury without proof of a vicious tendency in the individual known to the owner. No authority for this proposition has been cited and I know of none. Indeed I venture to doubt whether without evidence we are entitled to assume that a horse turned out with others is so dangerous to its companions and so likely to kick or otherwise injure them as to render him dangerous and so to exclude him for the time from the class of non-dangerous animals.

It is true that in the trespass cases where the injury has naturally taken place the supposed propensity has been referred to as connecting the injury with the trespass, but that is a very different thing from saying that in all cases the knowledge of the probability of such an injury being caused must be imputed to the owner. It is a very familiar sight in a grass country to see several horses turned out in the same field without apparently any idea on the part of the owner that he is doing a dangerous thing, and Darling J. himself appears to realize that the principle upon which he acted in the present case could not be of universal application. There may of course be circumstances rendering a particular animal not usually of vicious tendencies dangerous for the time, e.g., a mare at seasons when she is subject to sexual excitement, but there is no evidence of any such circumstances in the present case. It is true the offending animal was a mare and the injured one a gelding, but the season was mid-autumn, and there is no reason to suppose that she was dangerous for any such reason as I have suggested, still less that her supposed dangerous condition was known to the defendant.

Moreover if, as is said, the tendency of horses to injure each other when turned out together is so general as is suggested, then seeing how common a thing it is for horses belonging to different owners to be so turned out, it is difficult to understand why the question raised in the present case should not have been determined before.

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The principle of *Rylands* v. *Fletcher* (1) in my opinion carries the matter no further. Unless the dangerous character of the particular animal and the defendant's knowledge of it are proved, he is entitled to use it in any ordinary way he pleases without being responsible for injuries it may cause to others. Something was made of the fact that the mare was shod. But both she and the plaintiff's horse—which was also shod—were in work in the day and were only turned out at night. It would, of course, be impracticable to remove the shoes under such circumstances. Nor do I consider the fact that the mare's shoes had calkins to bear upon the question. There is nothing unusual in such a mode of shoeing, and there is no evidence that the risk of a broken leg as the result of a kick was thereby increased.

On the whole, I am of opinion that the judgment in the plaintiff's favour was erroneous, and that the appeal ought to be allowed and judgment entered for the defendant with costs here and below.

ATKIN L.J. In this case, the facts of which it is not necessary for me to recapitulate, the plaintiff in his particulars claimed damages for negligence. The learned deputy county court judge, without finding negligence, decided in favour of the plaintiff for reasons which I will summarize as being based on *Fletcher* v. *Rylands*. (2) In the Divisional Court the learned judges dismissed the appeal for different reasons, Darling J. on the ground of negligence and Salter J. on the ground adopted by the learned county court judge. In this Court the judgment was supported on three grounds by Mr. Matthews in his attractive, learned and exhilarating argument (1.) Negligence, (2.) Trespass to goods, (3.) *Fletcher* v. *Rylands*. (2) The negligence alleged was in turning the mare into the field (i.) without warning to the plaintiff or (ii.) without first removing her shoes. In any case I do not see how the plaintiff could be entitled to judgment on this ground, which necessarily involves findings of fact both of negligence and of the damage alleged being caused by the

(1) L. R. 3 H. L. 330. (2) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

negligence. The learned county court judge has made no such findings. But I further think that he has in substance negatived both. The point about the shoes is hopeless. Both the horse and the mare were shod, both being turned into the field at nights after working by day. As to notice, though the judge in terms negatives a "custom" to give notice, I think that he means to dispose of the suggestion in evidence that it is a usual practice to give such a notice and therefore the omission to give it is proof of negligence. I will only add that while in other cases notice may be proved to be a reasonable precaution, the decision must turn on the special circumstances of each case, and it may well be that notice to the agister who presumably knows the number and nature of the beasts already in the pasture and the names and addresses of their owners would be in any circumstances sufficient.

Then secondly as to trespass to goods. This ground was but faintly argued. If *Holmes* v. *Mather* (1) be correctly decided, trespass to goods must be the result of an act either wilful or negligent. This damage was neither. But whatever be the true view of the law of trespass to goods as to acts done by the defendant or his servants, I can find no trace of a man being held liable in such an action for the acts of his animals whether by way of asportavit or direct injury to goods. If there were such a liability in many contested claims for damages for injury to chattels caused by a collision of horse-drawn vehicles negligence would have been irrelevant. The hen that flew into the bicycle (*Hadwell* v. *Righton* (2)) and the sheep that collided with the motor car (*Heath's Garage, Ld.* v. *Hodges* (3)) would both have involved their owners in liability. I am satisfied that whether a horse directly injures a chattel or a dog accomplishes an "asportavit" of a golf ball, he does not involve his owner in liability for trespass to goods, at any rate unless the owner has intentionally caused the act complained of.

Thirdly. The principle contended for is that adopted by

(1) L. R. 10 Ex. 261. (2) [1907] 2 K. B. 345.
(3) [1916] 1 K. B. 206.

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Salter J. in the Court below cited from the judgment of Erle C.J. in *Cox* v. *Burbidge* (1), "the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it." I think that the proposition so stated, divorced from its context, is too wide. It is true that the owner of an animal feræ naturæ must keep him under control, and if he allows him to escape from control he is liable for damage done by such animal. It is also true that the owner of a domesticated animal mansuetæ naturæ which has acquired to his knowledge some vicious or mischievous propensity is responsible to the same degree as though it were an animal feræ naturæ, because as Willes J. says it forms an exception to its class: *Cox* v. *Burbidge*. (2) It is further true that the owners of some classes of animals mansuetæ naturæ, of which the horse forms one, are liable for damage done by such animals when straying on the lands of another; and that amongst the reasons given for such liability is that the tendency to stray is one of the natural propensities of such animals known to the owner. But it does not appear to follow that the owner of an animal mansuetæ naturæ is responsible for all the consequences of the known propensities of its class even though they may be likely to result in damage. Cattle trespass is an old and well-known cause of action of which the foundation is the trespass to land. The reason for holding the owner liable for such trespass has varied from time to time, and may now be taken to be the view as stated by Erle C.J. in *Cox* v. *Burbidge* (1) adopted by Salter J. in this case, and stated by Blackburn J. in his classic judgment in *Fletcher* v. *Rylands*. (3) But if it is sought to extend the proposition so as to impose liability for all damage other than trespass it can be demonstrated to be too wide. It would then cover the case of all animals whether wild or tame, and impose the same liability upon the owner of a tiger and of a cow in respect of the natural propensities of both. Why then discuss the question of trespass at all? If it is

(1) 13 C.B. (N. S.) 430, 436. (2) 13 C. B. (N. S.) 430, 440.
(3) L. R. 1 Ex. 265, 280.

the natural propensity of horses or cattle to consume the hay or corn they obtain access to or to bite or kick strange horses what is the relevance of the trespass in *Lee* v. *Riley* (1) or in *Ellis* v. *Loftus Iron Co.* (2) The latter is an instructive case, for the claim was for negligence and so found by the county court judge, and the judgment was upheld by this Court not on the ground of negligence (as to which they had doubts) but expressly on trespass because the stallion had obtruded its head over the plaintiff's fence to bite the mare. It seems plain from the judgments that the members of the Court would never have relied upon what was admittedly a technical ground if they had considered the large proposition now asserted to be established. Moreover it is conceded that the doctrine does not apply to damage done by domestic animals on the highway. A bull may stray from the highway into a china shop without imposing liability on its owner: see *Tillett* v. *Ward* (3) (it was in that case an ironmonger's shop), and a horse may with impunity, so it is said, on the highway kick another horse. But a tiger may neither trespass off the highway nor do damage on the highway without liability to the owner. The owner of a dog is not liable for its trespass and damage without proof of scienter of a special mischievous propensity to do such damage (compare *Mason* v. *Keeling* (4) per Holt C.J. and *Read* v. *Edwards* (5)), a distinction quite illogical if the large proposition be correct. Presumably the owner would be liable if dog bit dog or cat. Such cases have occurred I suppose thousands of times without any trace that I can find of legal liability, and in the correlative case of cat biting dog, the liability has been negatived: see *Clinton* v. *J. Lyons & Co.* (6) And as has been put in argument in one of the cases, is the owner liable if cat eats neighbour's canary? There can be no distinction in principle so far as this proposition is concerned between animals subjects of larceny at common law and animals not such subjects. The truth is I think that the foundation of the

(1) 18 C. B. (N. S.) 722.
(2) L. R. 10 C. P. 10.
(3) 10 Q. B. D. 17.
(4) 1 Ld. Raym. 606, 608.
(5) 17 C. B. (N. S.) 245.
(6) [1912] 3 K. B. 198.

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Atkin L.J.

liability in cases of the *Fletcher* v. *Rylands* (1) type and in the special case of cattle trespass is the duty to keep the animal in control. It appears to me that the principle has no application to cases where tame animals with no special individual mischievous propensity are lawfully let loose in the course of the ordinary use of them, and the only danger to be apprehended is from contact with other animals in places where they may all lawfully be. I think that the truth as to animals is correctly expressed with the proper limitations in the judgments of Williams and Willes JJ. in *Cox* v. *Burbidge*. (2) Williams J. says: "I apprehend the general rule of law to be perfectly plain. If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence, is altogether immaterial. I am clearly liable for the trespass, and for all the ordinary consequences of the trespass, subject to a distinction which is taken very early in the books, that the animal is such that the owner of it may have a property in it which is recognizable by law. For instance, if a man's cattle, or sheep, or poultry, stray into his neighbour's land or garden, and do such damage as might ordinarily be expected to be done by things of that sort, the owner is liable to his neighbour for the consequences." And Willes J. says: "The distinction is clear between animals of a fierce nature, and animals of a mild nature which do not ordinarily do mischief like that in question. As to the former, if a man chooses to keep them, he must take care to keep them under proper control, and, if he fails to do so, he is taken to know their propensities, and is held answerable for any damage that may be done by them before they escape from him and return to their natural state of liberty. As to animals which are not naturally of a mischievous disposition, the owner is not responsible for injuries of a personal nature done by them, unless they

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

(2) 13 C. B. (N. S.) 430, 438, 439.

are shewn to have acquired some vicious or mischievous habit or propensity, and the owner is shewn to have been aware of the fact. If the animal has such vicious propensity, and the owner knows of it, he is bound to take such care as he would of an animal which is feræ naturæ, because it forms an exception to its class."

There appears to me to be no such general principle of law as is adopted by the county court judge. If there had been it seems to me inconceivable that it should not have been enforced before this date.

I may add that in this particular case I think that the true inference is that the owner of the horse which he had placed in the field took the risk of damage arising from the introduction of other animals not due to any special mischievous propensity of such animal. But as this point does not appear to have been expressly raised in the country court, and in deference to the elaborate argument addressed to us on the other points, I have preferred to found my decision upon the reasons already given.

I think, therefore, that as there was here no negligence and no trespass, the appeal should be allowed with costs here and below, and judgment entered for the defendant with costs on the scale allowed by the county court judge.

Appeal allowed.

Solicitors for appellant: *Smith & Hudson, for Payne & Payne, Hull.*

Solicitors for respondent: *Windybank, Samuell & Lawrence, for Laverack, Wray & Co., Hull.*

W. I. C.

1923
April 26.

ADAMS *v.* MORGAN AND COMPANY, LIMITED.

[1922. A. 2562.]

Principal and Agent—Indemnity—Vendor of Business continuing to carry it on as Agent of Purchasers—Right of Vendor to be reimbursed Super Tax paid by him on Profits of Business.

An agent who is placed by his principal in a position in which he becomes liable to pay, and does pay, money to a third party, is entitled to be indemnified in respect of that payment, notwithstanding that the principal may not thereby have been relieved from a liability.

By an agreement dated August 22, 1919, the plaintiff sold his business to the defendants, a limited company. Till completion on September 15 the plaintiff was to carry on the business and was to be deemed to have been carrying it on as from December 31, 1918, on account, and for the benefit, of the defendants, and he was to account " and be entitled to be indemnified accordingly." The agreement further provided that the plaintiff was to receive a monthly sum of 208*l.* 6*s.* 8*d.* by way of remuneration for managing and carrying on the business from January 1, 1919, until completion. The plaintiff managed and carried on the business during that period and by reason thereof was assessed to, and had to pay, super tax on the profits of the business earned in so doing. The plaintiff claimed to be indemnified by the defendants in respect of the super tax so paid and also in respect of certain costs which he had incurred in connection with the assessment :—

Held, that the plaintiff was entitled to the indemnity claimed, notwithstanding that the defendants, being a limited company, were not liable to pay super tax.

Brittain v. *Lloyd* (1845) 14 M. & W. 762 applied.

Spencer v. *Parry* (1835) 3 Ad. & E. 331 distinguished.

ACTION tried by McCardie J.

By an agreement dated August 22, 1919, the plaintiff sold his business to the defendants, a limited company, as from January 1, 1919, for the sum of 120,000*l.* The material clauses of the agreement were as follows :—

" 2. There shall be excepted out of the sale hereby agreed upon assets equivalent to the liability for excess profits duty and income and super tax for the year 1918 and to the amount of the liabilities of the business all as shown in the balance sheet at midnight on December 31, 1918 . . . . " other than certain specified liabilities.

" 5. The vendor shall pay discharge and satisfy all debts

and liabilities of the said business including income tax and excess profits duty up to December 31, 1918."

"7. The purchase shall be completed on . . . . September 15, 1919. . . . . The possession of the property hereby agreed to be sold shall be retained by the vendor until completion and he shall in the meantime carry on the said business as heretofore and from December 31, 1918, shall be deemed to have been carrying on the said business on account of and for the benefit of the purchasers and the vendor shall account and be entitled to be indemnified accordingly."

"13. The purchasers shall pay to the vendor as from January 1, 1919, up to the actual date of completion a sum at the rate of 208*l.* 6*s.* 8*d.* per calendar month by way of remuneration for his services in connection with the management and carrying on of the business from January 1, 1919, until the actual date of completion."

"16. The vendor shall enter into a covenant with the company for the benefit of the members thereof guaranteeing that the net profits of the company in respect of the said business during the six months calculated from January 1, 1919, to June 30, 1919, shall amount to not less than 10,000*l.*, and if such net profits shall not for the said period amount to the said sum of 10,000*l.* the vendor his executors or administrators shall immediately after the same shall have been ascertained and notice thereof given to him or them pay to the company in trust for the members thereof a sum sufficient to make up the sum guaranteed. . . . ."

The plaintiff duly carried on the business from January 1, 1919, in his own name until the actual date of completion for and on behalf of the defendants, and by reason thereof he was assessed by the Commissioners of Income Tax to super tax on the profits earned by him therein for and on behalf of the defendants in a sum of 1459*l.* 1*s.* in excess of that for which he would otherwise have been assessed. This assessment was in respect of the period from April 6, 1919, to August 22, 1919. On appeal by the plaintiff this assessment was affirmed and the plaintiff had to pay the sum of 1459*l.* 1*s.*, and he incurred costs to the amount of 30*l.* 10*s.*

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in connection with the assessment and appeal. The defendants, who were duly informed of these proceedings, were then called upon to indemnify the plaintiff in respect of those two sums, and as they denied liability therefor the present action was brought in which the plaintiff claimed to recover those amounts.

Compston K.C. and *Croom-Johnson* for the plaintiff. The plaintiff is entitled to the indemnity claimed. Admittedly, the defendants are bound to indemnify him as regards income tax, and as super tax is "an additional duty of income tax" —see s. 4 of the Income Tax Act, 1918—they are equally bound to indemnify him as regards super tax. It is said, however, that the defendants are not liable, because being an incorporated company, they are not liable to pay super tax. In view of the decision in *Brittain* v. *Lloyd* (1) that argument is not sustainable. In that case it was decided that an action for money paid is maintainable in every case in which the plaintiff has paid money to a third party at the request, express or implied, of the defendant, with an undertaking, express or implied, to repay it; and it is not necessary that the defendant should have been relieved from a liability by the payment. Pollock C.B. said (2): "The request to pay, and the payment according to it, constitute the debt; and whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference": see also *Williams* v. *Lister & Co.* (3) Here, the defendants, by requesting the plaintiff to carry on the business during the material time on their behalf, placed the plaintiff under a liability to pay the super tax in question, and consequently they are liable to indemnify him; just as, conversely, they would be entitled to any profit which the agent might make, although they could not themselves have been entitled to receive it: per Cotton L.J. in *Boston Deep Sea Fishing and Ice Co.* v. *Ansell.* (4) Further,

(1) 14 M. & W. 762.
(2) 14 M. & W. 773.
(3) (1913) 109 L. T. 699.
(4) (1888) 39 Ch. D. 339, 354–5.

the indemnity to which the plaintiff is entitled extends to the costs he incurred in connection with the assessment and the appeal therefrom: *Williams* v. *Lister & Co.* (1)

Merriman K.C. and *Blanco White* for the defendants. The liability to super tax was a personal liability of the plaintiff, and he can only succeed in this action if he can show that the defendants have by the agreement between them made it their liability: *Spencer* v. *Parry* (2); and it is clear that by the agreement the defendants have not assumed this liability. The parties were considering the debts and liabilities of the business, not the personal liabilities of the plaintiff, and it cannot have been in the contemplation of the parties that the defendants should undertake to pay the plaintiff's personal liability; especially when it is remembered that at the date of the agreement that liability had already accrued from a source of income which the plaintiff guaranteed was not less than 10,000*l.* for six months, and in respect of which he must be taken to have received an equivalent consideration.

Compston K.C. in reply. *Spencer* v. *Parry* (2) has no application for the reason pointed out in *Brittain* v. *Lloyd.* (3)

McCARDIE J. stated the facts, and read the clauses of the agreement set out above, and continued: In substance, Mr. Merriman's argument on behalf of the defendants amounts to this, that the plaintiff, as an individual, was bound to pay to the Exchequer the amount of this super tax and that there is nothing in the circumstances or in the agreement which throws upon the defendants the obligation of indemnifying him in respect of that tax, for which they, the defendants, could not be liable.

Before I consider the principles applicable I think it is desirable to state my view of the meaning of this agreement. It was recognized by the agreement that the plaintiff was to keep out of moneys of the company before he handed them over all his liability for excess profits duty and income tax and super tax down to 1918. Bearing that in mind,

(1) (1913) 109 L. T. 699. (2) 3 Ad. & E. 331.
(3) 14 M. & W. 762.

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McCardie J.

I think that the net result of clause 7 (which provided that as from December 31, 1918, the business was to be deemed to be carried on by the plaintiff for the benefit of the defendants and that the plaintiff should account and be indemnified accordingly) taken in conjunction with clause 13 (which made the plaintiff a paid agent as from January 1, 1919) was to create, by express agreement, in the plaintiff the condition or status of an agent and trustee for the defendants. That being so I have to consider Mr. Merriman's contention that the plaintiff has no claim to be indemnified. Prima facie if an agent carries on a business for a principal he is entitled to a full indemnity. For the purpose of illustrating the principle applicable I take a case free from all minutiæ. A manufacturer says to his agent: "I want you to start business in a particular branch in your own name but for my benefit; my name must not appear; you alone will appear to be the principal, and I will indemnify you." The agent starts the branch, which prospers, and the agent, who receives only a small salary, has to pay over all the profits. By virtue of his situation he is assessed to income tax and super tax. If in those circumstances the agent were left with the full measure of liability for income tax and super tax while the principal took the whole of the profits, no effect whatever would be given to the principal's obligation to indemnify the agent. Applying that simple illustration to the present facts I can see no reason why the plaintiff should not be entitled to the indemnity claimed. The moment it appears that the plaintiff was the defendants' paid agent as from January 1, 1919, the rule as to indemnity laid down in *Brittain* v. *Lloyd* (1) becomes applicable. In that case an auctioneer was held entitled to be indemnified in respect of payments made, although his principal had not become liable for them, just as in the present case the defendants had not become liable for super tax. *Brittain* v. *Lloyd* (1) illustrates the broad indemnity principle applicable in agents' cases. A further illustration is furnished by *Williams* v. *Lister & Co.* (2)

(1) 14 M. & W. 762.

(2) 109 L. T. 699.

Mr. Compston referred to the converse case of *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1), where it was laid down that just as an agent, in the absence of special circumstances, is entitled to a full indemnity, so he is bound to account for every profit. The two things go together. I hold, therefore, that the broad, common law principle that an agent is entitled to a full indemnity is applicable in this case. As to *Spencer* v. *Parry* (2) I need only say that it is distinguishable. It was distinguished in *Brittain* v. *Lloyd* (3), and really turned on a point of pleading.

I do not wish, however, to base my decision merely upon the common law ground, broad and useful though it is; there is an independent ground, because, as from January 1, 1919, the plaintiff must be taken to have been a trustee for the defendants, and, in my view, his rights as trustee from that date are as wide as they would be in the case of an ordinary agent. A trustee, if carrying on a business, and therefore liable to pay income tax or super tax for the trust, is entitled to be indemnified as far as can be. The principle stated in Underhill on Trusts and Trustees, 7th ed., p. 429, that a trustee is entitled to be reimbursed out of the trust property all expenses which he has properly incurred is applicable. In this case the liability to super tax arose out of the circumstance that from January 1 to August, 1919, the plaintiff was trading for the benefit of the defendants. The application of this principle is also illustrated in Godefroi's Trusts and Trustees, 4th ed., p. 690, and by the judgment of Lord Lindley in *Hardoon* v. *Belilios* (4) where that distinguished judge indicated the full measure of indemnity to which a trustee is entitled. He said (5): "The plainest principles of justice require that the cestui que trust who gets all the benefit of the property should bear its burden unless he can show some good reason why his trustee should bear them himself. The obligation is equitable and not legal, and the legal decisions negativing it, unless there is some contract or custom imposing the

(1) 39 Ch. D. 339, 354–5.
(2) 3 Ad. & E. 331.
(3) 14 M. & W. 762.
(4) [1901] A. C. 118.
(5) Ibid. 123

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obligation, are wholly irrelevant and beside the mark." In a later passage he pointed out that the trustee's right of indemnity may go beyond the actual trust property within his power and may extend so as to impose upon the cestui que trust a personal obligation enforceable in equity to indemnify the trustee.

For the reasons I have given the plaintiff is entitled to succeed and there will be judgment in his favour for 1459*l.* 1*s.* and the sum of 30*l.* 10*s.*, which he properly incurred in seeking to adjust the super tax with the Income Tax Commissioners.

Judgment for plaintiff.

Solicitors for plaintiff: *E. Flux, Leadbitter & Neighbour.*
Solicitors for defendants: *Billinghurst, Wood & Pope.*

J. S. H.

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Feb. 20; *March* 12.

[IN THE COURT OF APPEAL.]

J. WALLS, LIMITED *v.* LEGGE.

[1921. J. 3790.]

Husband and Wife—Alimony pendente lite—Separate Property—Equitable Execution—Receiver.

A husband and wife were joint lessees of a dwelling house. The lease was mortgaged. The husband paid the rent, rates, taxes, and interest on the mortgage, which amounted together to 294*l.* The wife with the children of the marriage lived in the lower part of the house. The upper part was let to a tenant at a rent of 200*l.* The husband allowed the wife to receive this rent. The value of her occupation of the lower part was 100*l.*

The husband instituted proceedings for divorce. The registrar fixed the amount of alimony pendente lite for the wife and children at 836*l.* a year. He treated her as already receiving 300*l.*, and an order was made that the husband should pay the wife alimony at the rate of 45*l.* a month, 540*l.* a year, for herself and the children.

Certain creditors of the wife recovered judgment against her and then obtained an order for the appointment of a receiver of the rents, profits, and moneys receivable in respect of her interest in the house:—

Held, that the order for a receiver must be discharged.

By Scrutton L.J. Because either the whole of the 300*l.* received by the

wife in respect of the house was alimony and therefore inalienable, or else one-half of it was alimony and the other half her separate estate which, after payment of rent, rates, taxes, and mortgage interest in respect of it, was of a negligible value.

By Younger L.J. Because by the true intent of the registrar's order the real interest which the wife enjoyed in the house was in the nature of alimony, apart from which she had no tangible interest in the house of which a receiver could be appointed.

APPEAL from an order of Bray J. in chambers dismissing an appeal from an order of a Master appointing a receiver of the rents, profits and moneys receivable in respect of the interest of Rose Eleanor Legge in a leasehold house No. 5 Ashburn Place, South Kensington, as hereafter mentioned.

In February, 1921, proceedings were instituted in the Probate, Divorce and Admiralty Division in which Brigadier-General Reginald Francis Legge was the petitioner and his wife, Rose Eleanor Legge, was the respondent. The said respondent was then living at 5 Ashburn Place aforesaid of which she and the petitioner were joint lessees for a term of years of which about forty years were yet to run. The lease was subject to a mortgage for 850*l.* and interest. The rent, rates, taxes, and mortgage interest together amounted to 294*l.* a year. The rateable value of the house was 150*l.* The petitioner was paying his wife an allowance of 25*l.* a month. In addition he allowed her to keep 200*l.* a year which she received from letting the upper part of the house and he also allowed her to live with her four children in the lower part of the house free of rent, rates, taxes, and mortgage interest.

The registrar of the Court in fixing the amount payable to the wife as alimony pendente lite took the gross income of the petitioner as 2170*l.* a year, and the gross income of the wife as 300*l.* a year, being as to 200*l.* the rent received by her from letting the upper part of the house, and as to 100*l.* the benefit she derived from living in the lower part free of the outgoings mentioned above. From the total of 2470*l.* he deducted 294*l.* in respect of outgoings of the house and of the balance of 2176*l.* he took one-fifth, i.e., approximately 436*l.* He treated the wife as already receiving 300*l.* and

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allowed her in addition to that 136*l.* for herself and 400*l.* for the maintenance and education of her four children.

On August 2, 1921, the President of the Probate, Divorce and Admiralty Division made an order that the petitioner should pay or cause to be paid to Rose Eleanor Legge, the respondent in the suit, alimony pending suit at and after the rate of 45*l.* a month for herself and the four children to commence from the service of the citation issued in the cause and to be paid monthly; credit to be given for payments made up to date.

In June, 1922, the eldest son of the petitioner and his wife Rose Eleanor Legge ceased to live with his mother.

On November 24, 1922, a firm of John Walls, Ld., brought an action against Rose Eleanor Legge for 78*l.* 3*s.* 9*d.* for goods sold, and recovered judgment against her for that amount.

On November 28, 1922, the registrar of the Probate, Divorce and Admiralty Division made an order that the petitioner should within a week pay to the said Rose Eleanor Legge arrears then payable under the order of August 2, 1921, and be at liberty to deduct from further payments the sum of 8*l.* 6*s.* 8*d.* monthly.

On December 14, 1922, John Walls, Ld., issued a garnishee summons against the petitioner, Reginald Francis Legge, and obtained an order nisi to attach the arrears of alimony payable under the order of November 28, 1922; but on December 19, 1922, the order nisi was discharged on the ground that alimony was not available for execution.

On December 22, 1922, John Walls, Ld., took out a summons in their action against Rose Eleanor Legge for the appointment of one B. W. Ellis as receiver to receive the rents, profits and moneys receivable in respect of the defendant's interest in the property 5 Ashburn Place, Kensington, S.W., in and towards satisfaction of their judgment debt of 78*l.* 3*s.* 9*d.* and costs then in course of taxation.

On January 15, 1923, the Master in chambers made an order for a receiver in the terms of the summons. Rose Eleanor Legge appealed to the judge in chambers.

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On January 23, 1923, Bray J., the judge in chambers, dismissed the appeal.

Rose Eleanor Legge appealed.

The appellant in person contended that the whole sum of 836*l.* was alimony and therefore inalienable and that the order for a receiver ought not to have been made.

P. Guedalla for the respondents. The 300*l.* a year, the appellant's interest in the house, is not alimony. Alimony is a sum of money payable under an order of the Court. There is no order of the Court providing for the appellant's right to receive the rent of the upper part or to live in the lower part of the house. The only alimony she receives is 540*l.* a year by monthly payments of 45*l.* under the order of August 2, 1921, as modified by the order of November 28, 1922. The practice of the Court in fixing alimony is to take the joint incomes of the husband and wife and allow one-fifth of the sum total to the wife. If she had a separate income equal to one-fifth of the joint incomes no order for alimony would be made; but it could hardly be contended that by making no order the Court converts the separate estate of the wife into alimony. What is true of the whole is true pro tanto. If the income of the husband were 2500*l.* a year and the income of the wife were 500*l.* a year, the Court would order the husband to pay 100*l.* a year for alimony; but that would not convert the wife's income of 500*l.* a year into alimony. There is a wide difference between alimony and property: *In re Robinson.* (1) If creditors succeed in attaching part of and so diminishing the wife's separate estate, her remedy is to apply to the Court for alimony or increased alimony.

[YOUNGER L.J. If the registrar decided that the alimony should be the 300*l.* a year which the husband already allowed, and 540*l.* a year in addition, would not the 300*l.* be part of the alimony?]

That is not what has happened. Nothing was said about the 300*l.* being part of the alimony.

(1) (1884) 27 Ch. D. 160.

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By consent of the parties the Court postponed their decision that they might ascertain from the registrar the basis on which he fixed the amount of the alimony.

March 12. SCRUTTON L.J. As the Court was left in some doubt upon what basis the alimony was fixed we have, with the consent of the parties, seen the registrar and have ascertained the facts from him.

The practice of the Court in decreeing alimony pendente lite is, in the absence of special circumstances, to add together the incomes of the spouses, take one-fifth of the sum, and see that the wife in some way receives that fifth during the proceedings or till further order. It may be that the wife has a separate income of her own equal to or more than one-fifth of the joint income. In that case no order for alimony is made in terms, because the Court sees that the wife is already in possession of one-fifth of the joint income.

In the present case the registrar taking into account the joint income and making certain deductions therefrom came to the conclusion that the appellant ought to have an allowance of 836*l.* a year for herself and her children. He found that she was already receiving the whole and not the half only of the proceeds of letting the upper part of the house of which she and her husband were joint lessees, and that the husband was allowing her to live in the lower part without making any claim upon her for his half of the letting value and without requiring her to pay anything towards the ground rent, rates, taxes, or mortgage interest in respect of the house. He treated her therefore as already receiving 300*l.* a year and, following the practice of the Divorce Division, made an order which in express terms covers only the balance of 536*l.*, with the trifling addition of 4*l.* Strictly speaking the whole of this 836*l.* is alimony. It falls within the definition of alimony given by Cotton L.J. in *In re Robinson* (1) as "an allowance which, having regard to the means of the husband and wife the Court thinks right to be paid for her maintenance from time to time." "The very nature of alimony," said the Lord

(1) 27 Ch. D. 160, 164.

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Justice, "is inconsistent with its being capable of assignment." Then after mentioning instances of allowances which are not alienable, such as the half-pay of the officers in the Army and Navy, he continues: "Although alimony is not the same thing, it is governed by the same principle. Alimony is an allowance which, having regard to the means of the husband and wife, the Court thinks right to be paid for her maintenance from time to time, and the Court may alter it or take it away whenever it pleases. It is not in the nature of property, but only money paid by the order of the Court from time to time to provide for the maintenance of the wife. Therefore it was not assignable by the wife." As a result all attempts to attach alimony have invariably failed. The respondents are creditors of the appellant. They tried to attach arrears of the money which under the name of alimony was expressly ordered to be paid by the order of November 28. That attempt failed. Now they are trying to attach the appellant's interest in the house, and they have obtained the order under appeal appointing a receiver of that interest, which is said to amount to 300*l.* a year. There are two ways of looking at that 300*l.* One-half of it is the share which the husband contributes towards the 836*l.* a year. That half is on the same footing as the monthly payments of 45*l.* As regards the other half, which would ordinarily be treated as the wife's share in the house, the rent, rates, and taxes and mortgage interest on that share amounting to 147*l.* a year would leave her with a balance of 3*l.* The Court does not appoint a receiver of such an interest as that. On the other hand if it is to be treated, more in accordance with reality, as a contribution by the husband towards the 836*l.*, inasmuch as he pays all the rent, rates, and other outgoings, it is on the same footing as the first half. The result is that of the whole 836*l.* 536*l.* is undisputed alimony, and the remaining 300*l.* is either wholly contributed by the husband under the order for alimony or half of it is contributed by him and the receivable interest in the other half is negligible. In either case the appeal must be allowed and the order for a receiver set aside.

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YOUNGER L.J. I am of the same opinion. The registrar thought it right in view of the joint income of the parties that the husband should provide for the wife and for the children who were living with her alimony to the amount of 836*l.* a year. That 836*l.* was as to 300*l.* thereof made up of the value of the house in which the wife was living treated as a house in respect of which there was no liability to pay rates, taxes, ground rent, or interest on any encumbrance. All these outgoings, amounting to at least 294*l.* a year, and possibly to more, because it is not clear that the mortgage interest is included in that sum, were to be borne and paid by the husband. The result is that, although the wife had as between herself and her husband an interest in an undivided moiety of the house, regarded as a leasehold subject to rent, rates, taxes, and mortgage interest, that interest was of no value at all; it only became worth 300*l.*, because by the registrar's order the husband was without recourse made responsible for the payment of moneys amounting to that sum. Consequently this 836*l.* consists of 536*l.* paid by the husband in cash to the wife and of 300*l.* paid by him in respect of rent, rates, taxes, and mortgage interest for the house, so that the house free from these burdens becomes alimony as much as the cash. Expressing the same thing in another way, the real interest which the wife enjoyed in the house, as the result of the registrar's order according to its true intent, was in the nature of alimony which cannot be attached at the instance of her creditors. Apart from this she had no tangible interest in the house of which a receiver could be appointed, and this order for a receiver ought never to have been made. An order more inappropriate in its terms as applied to the real position would have been difficult to frame.

I agree with Mr. Guedalla that if this order for alimony had been made on the footing that 300*l.* of it actually represented the wife's separate unencumbered estate so that the husband was to provide 536*l.* and no more, there would have been no objection to the appointment of a receiver of the 300*l.* The fact that the husband is ordered to pay less

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because the wife already possesses separate property does not, as it seems to me, alter the character of that separate property, and the claims of her creditors may be enforced against it as if there had been no order for alimony. But that point does not arise in this case, because no part of this 836*l.* which the wife is receiving represents her separate property, and therefore there is nothing for a receiver on that footing to receive. The appeal must be allowed and the order must be discharged.

Appeal allowed.

Solicitors for appellant: *Loxdales.*

Solicitors for respondents: *Lendon & Carpenter.*

W. H. G.

[IN THE COURT OF APPEAL.]

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EDELL *v.* DULIEU.

[1922. E. 1476.]

Landlord and Tenant—Agricultural Holding—Lease with Option to determine—Notice to quit—Length of Notice—Agriculture Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 76), *ss.* 13, 28—*Agricultural Holdings Act*, 1908 (8 *Edw.* 7, *c.* 28), *ss.* 13, 14, 22, 48.

The Agriculture Act, 1920, s. 28, which renders a notice to quit a holding invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy, applies not only to the case of a yearly tenancy, but to all contracts of tenancy, including a lease for twenty-one years with an option to the lessor to determine it on six months' notice at the end of the first seven or fourteen years of the term.

Decision of the Divisional Court [1923] 1 K. B. 533 reversed.

APPEAL from the decision of a Divisional Court (Bailhache and McCardie JJ.). (1)

By an indenture of lease dated September 30, 1915, the plaintiffs, John Frederick Edell and George Arthur Edell, demised to the defendants Robert Dulieu and James Dulieu a farm called Wood End Green Farm, Northolt, Middlesex,

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at a rental of 192*l.* 10*s.* per annum for a term of twenty-one years, as from September 29, 1915. Clause 15 of the lease provided that "if the lessors shall be desirous of determining the term hereby granted at the end of the said first seven or fourteen years of the said term and shall deliver unto the lessees or leave on the said demised premises six calendar months' previous notice in writing of such desire then . . . . at the end of such seven or fourteen years as the case may be this demise shall cease and determine"; and there was a similar provision in favour of the lessees. On February 15, 1922, the plaintiffs through their solicitors gave the defendants notice in writing in accordance with clause 15 of the lease, to quit and deliver up possession of the premises subject to the lease on the determination of the first seven years thereof —namely, on September 29, 1922.

On October 2, 1922, the plaintiffs issued a specially indorsed writ claiming possession of the demised premises. Upon a summons by the plaintiffs for judgment under Order XIV. the defendants in an affidavit in opposition alleged that the notice to quit was invalid, inasmuch as it purported to terminate the tenancy "before the expiration of twelve months from the end of the then current year of the tenancy," contrary to the Agriculture Act, 1920, s. 28. (1)

(1) Agriculture Act, 1920 (10 & 11 Geo. 5, c. 76), s. 13, sub-s. 1: "In the case of a tenancy of a holding for a term of two years or upwards, the tenancy shall not terminate on the expiration of the term for which it was granted unless not less than one year nor more than two years before the date fixed for the expiration of the term a written notice has been given by either party to the other of his intention to terminate the tenancy, and any notice so given shall be deemed to be a notice to quit for the purposes of the Act of 1908 and this Act." . . . .

Sub-s. 3: "This section shall not apply to any tenancy granted, or agreed to be granted, before the commencement of this Act."

Sub-s. 4: "In any case to which this section shall apply, it shall apply notwithstanding any agreement to the contrary."

Sect. 14: "Where the tenancy of a holding determines in the circumstances mentioned in s. 1 of the Landlord and Tenant Act, 1851, the tenant shall, instead of continuing in occupation as provided by that section until the expiration of the then current year of his tenancy, continue in occupation until the occupation is determined by a twelve months' notice to quit expiring at the end of a year of the tenancy."

Sect. 28, sub-s. 1: "Notwithstanding any provision in a contract of tenancy to the contrary, a notice to quit a holding shall be invalid if

After hearing counsel on both sides, the Master gave judgment for the defendants, and from this judgment the plaintiffs appealed to the Divisional Court.

That Court held that s. 28 applied only to yearly tenancies and they reversed the decision of the Master.

The defendants appealed.

Compston K.C. and *F. Hinde* for the appellants. Although the tenancy was for a period of over two years, twelve months' notice was required by s. 28 of the Act of 1920. Sect. 13, apart from the provision of sub-s. 3 thereof, does not apply to this case; it was intended to apply only to leases which expired simply by effluxion of time, and were not determinable upon notice apart from the statutory requirement. Here, notice was required to determine the lease at the end of the first seven years. Sect. 28 applies to all cases of contract of tenancy where a notice to quit is necessary.

The expression "contract of tenancy" in s. 28 is defined by s. 48 of the Agricultural Holdings Act, 1908, as "a letting of or agreement for letting land for a term of years, or for lives, or for lives and years, or from year to year"; and by s. 36 of the Act of 1890, Part II. of that Act is to be construed as one with the Act of 1908. A notice to determine a tenancy is the same thing as a notice to quit: *Ahearn* v. *Bellman.* (1)

Having regard to the definition of "contract of tenancy" s. 28 cannot possibly be limited to tenancies from year to year. If it were not so the appellants in this case would be deprived of all compensation under the Act.

it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy; but nothing in this section shall extend to a case where a receiving order in bankruptcy is made against the tenant."

Sub-s. 2: "Sect. 22 of the Act of 1908 (which relates to the time of notices to quit) is hereby repealed."

Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 48, sub-s. 1: "In this Act unless the context otherwise requires, 'contract of tenancy' means a letting of or agreement for letting land for a term of years, or for lives, or for lives and years, or from year to year."

(1) (1879) 4 Ex. D. 201.

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Holman Gregory K.C. and *T. Rowand Harker* for the respondents. Sect. 28 does not apply to this case. It was intended to apply to yearly tenancies only and not to leases for terms of years. The words "the then current year of tenancy" are inapt as applied to a lease. There is no current year of tenancy. There is a current term.

Sect. 13 of the Act of 1920 does not apply to this case, because the lease was granted before the commencement of the Act, and by sub-s. 3 the tenancy is excluded.

The six months' notice given by the respondents in accordance with clause 15 of the lease is valid.

Compston K.C. in reply. The plain words of s. 28 cannot be cut down in their operation. Reading it with s. 48 of the Act of 1908 it plainly applies to leases for a term of years. The trend of the legislation is to give greater security to tenants. The words "then current year of tenancy" mean the year of the tenancy which is current at the time of the giving of the notice to quit.

LORD STERNDALE M.R. This is an appeal from a decision of the Divisional Court, composed of Bailhache and McCardie JJ., which reversed a decision of Master Jelf on the question of the validity or invalidity of a notice to terminate a tenancy. In a previous case I appear to have cited a decision or dictum of Bramwell L.J. in *Ahearn* v. *Bellman* (1) that there is no real difference between a notice to quit and a notice to determine a tenancy. I see no reason to differ from that. I say that, not because I think it is essential to the decision of this case, but because the matter has been discussed. In this case the notice was given in pursuance of the terms of a lease made in 1915, by which the lessors agreed to let to the lessee a farm in Norfolk, for the term of twenty-one years from September 29, 1915, "determinable nevertheless as hereinafter mentioned." [His Lordship read clause 15 of the lease and continued:] The lessors did give such a notice on February 15, 1922. That would be more than

(1) (1879) 4 Ex. D. 201.

six months before the end of the first seven years. The end of the first seven years was September 29, 1922. Apart from any statute therefore the notice is perfectly good, because it was given in accordance with the terms of the lease. It is a notice that the lessors desire that the term of years created by the lease "shall determine at the end of the first seven years thereof in accordance with the proviso in that behalf contained in the said indenture, and that you quit and deliver up possession of the premises subject to the said indenture on such determination." The question is whether that is made invalid by reason of s. 28 of the Agriculture Act, 1920. [His Lordship read the section and continued:] The tenant contends that that section applies to this case, and that as the notice purports to terminate the tenancy on September 29, 1922, it purports to determine it before the expiration of twelve months from the end of the then current year of tenancy, that current year being the year that was running when the notice was given. On the other hand the respondent contends, and the learned judges have adopted his contention, or at any rate the conclusion of his contention, because they differ slightly as to the grounds upon which they base their judgment, that this lease and this tenancy is not within s. 28 at all, because it is what is called "an old lease," that is a lease granted before the commencement of the Act of 1920, and that it comes within s. 13, which is in these terms: [His Lordship read the section and continued:] The argument is that that section, but for the fact of the lease being an old one, would apply to it, because it is intended to apply to a tenancy of a holding for a term of two years or upwards—that is to say, it would apply in the case of a lease—whereas s. 28 is intended to apply and does apply to yearly tenancies only. In order to show that s. 13 would apply to this case if the lease had not been an old lease, it is necessary to read the words "tenancy shall not terminate on the expiration of the term" as "shall not terminate on the expiration of the term which is in existence after the six months' notice has been given," and therefore the term for which it is granted is said to be

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seven years or fourteen years or twenty-one years. I do not think it is necessary to decide whether that would be so or not. Prima facie it would look as if the term which was granted was twenty-one years, although it was granted terminable "as hereinafter mentioned"; I do not intend to decide whether s. 13 would in any case apply or not. The difficulty of confining s. 28 to tenancies from year to year arises from the language that is used, and we must read the language in its ordinary meaning, unless there be very strong reason to the contrary. The language to which I refer is this: "notwithstanding any provision in a contract of tenancy to the contrary." A contract of tenancy is defined by s. 48 of the Agricultural Holdings Act, 1908, with which Part II. containing s. 28 of the Act of 1920 is to be construed as one. That definition of contract of tenancy is "a letting of or agreement for letting land for a term of years, or for lives, or for lives and years, or from year to year." In order to adopt the respondent's contention it is necessary to cut down the language of s. 28 by reading it thus: "Notwithstanding any provision in a contract of tenancy from year to year to the contrary," and that, in my opinion, we ought not to do unless there are provisions which compel us to do so. It was argued that we ought to do so, because s. 28 repeals s. 22 of the Act of 1908, which relates to the time of notice to quit, and therefore we should read s. 28 as being strictly a substitution for s. 22 in this sense, that it must be taken to deal only with the same subject matter as the section which it repeals. The subject matter of the repealed section is obviously tenancies from year to year, because it says so in so many words; "where a half year's notice, expiring with a year of tenancy, is by law necessary and sufficient" to determine a tenancy of a holding from year to year, certain consequences shall follow. As I say, it was argued that we must take s. 28 as being confined to the same subject matter as that repealed section. If that be so, it seems to me that the change of language is very extraordinary. When the Legislature was dealing with a tenancy from year to year it knew how to express its intention, but in s. 28 it, intentionally I should

think—at any rate it directly departs from the language of s. 22 and speaks of a contract of tenancy, which is defined in the way I have read, and I do not see that it is possible to say that the use of that very different language was intended to mean exactly the same thing as the language of s. 22.

But a difficulty has certainly been raised in my mind by the use of the words "from the end of the then current year of tenancy," because those are very apt as an expression dealing with a tenancy from year to year, but they do not seem to me to be at all apt to deal with a tenancy in which there may be a current term, but in which you might not ordinarily speak of a current year. But that I think is not an insuperable difficulty when consideration is given to the words, which I will read again: "Notwithstanding any provision in a contract of tenancy to the contrary, a notice to quit a holding shall be invalid if it purports to determine the tenancy before the expiration of twelve months from the end of the then current year of tenancy." That, it seems to me, can be referred, without very great difficulty, to the end of the year of tenancy which is current at the time the notice is given. The word "then" refers to the time when the notice is given. It seems to me that so to read it, although the words are not very apt, does not do violence to the language of the section to the same extent as would be necessary if we were to read the first words, "any provision in a contract of tenancy," as meaning "any provision in a contract of tenancy from year to year." Therefore I differ from the learned judges in the Court below, and I come to the conclusion that s. 28 does apply to this case, and that in order to give a valid notice to terminate the tenancy at the end of the seventh year it must be given during the currency of the sixth, because, if it be given during the seventh, then if it is to terminate the tenancy at the end of the seventh it must terminate it at a period of less than twelve months from the end of the then current year of tenancy.

For that reason I think the appeal should be allowed

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and the judgment of the Master restored, to the effect that this is not a valid notice to quit at the end of the seventh year.

WARRINGTON L.J. I am of the same opinion. The question we have to determine is whether the term of years created by the lease of September 30, 1915, has been validly determined by a six months' notice, being the notice stipulated for by the contract, or whether by reason of recent legislation it can only be determined by a twelve months' notice. The lease was for a period of twenty-one years terminable as "hereinafter mentioned," and the subsequent provision enabled the lessor to determine the term at the end of the seventh or fourteenth year by giving six calendar months' previous notice. The notice which the lessor gave was dated February 15, 1922, and it is conceded that but for the legislation in question that would have effectually determined the term at the end of the seventh year, on September 29, 1922. The statutory provision which is relied upon by the defendants is s. 28 of the Agriculture Act, 1920. That section is in these terms: "Notwithstanding any provision in a contract of tenancy to the contrary, a notice to quit a holding shall be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of tenancy." This particular notice paid no attention to the difficulty which was undoubtedly caused by the expression "the then current year of tenancy," and assuming that means any year of the twenty-one years granted by the lease, this notice having been given during the year 1922, if it is to be effectual, the tenancy would terminate before the expiration of twelve months from the end of that year, and the section would only be complied with if the notice had been given during the sixth year to expire at the end of the seventh year. The section in terms applies to all contracts of tenancy, because it begins with the words: "Notwithstanding any provision in a contract of tenancy to the contrary." I now turn to s. 48 of the Act of 1908 with which the Act of 1920 is to be

read, and I find there a definition of contract of tenancy: "'Contract of tenancy' means a letting of or agreement for letting land for a term of years, or for lives, or for lives and years, or from year to year." Prima facie, therefore, the provision contained in s. 28 applies to the termination of a letting for a term of years, and if it so applies, then the notice which has been given would be insufficient, because, as I have pointed out, it would cause the tenancy to expire less than twelve months from the end of the year in which it was given. But then it is said that there are expressions in the section itself and other provisions of the Act which are sufficient to show that on the true construction of the Act the section must be read as limited to tenancies from year to year, and not as extending to lettings for a term of years. With regard to the section itself, the expression relied upon in order to support that view of the construction, is an expression which I have already referred to, and for the moment assume to mean the then current year of tenancy. There is no question, I think, that that expression is more appropriate to a tenancy from year to year than it is to a year taken out from the middle of a term of years created by a lease. I have no doubt about that, but it is not impossible as a matter of grammatical construction to treat a year of a term as being a current year if the Legislature are minded so to use the term. It has been pointed out to me by Atkin L.J. (which I had not noticed before), that in another section of the Act of 1920, that is s. 14, "current year of the tenancy" is clearly used in that sense. That is the section which deals with tenancies which determine on, amongst other circumstances, the death of the landlord or lessor. It commences thus: "Where the tenancy of a holding determines in the circumstances mentioned in s. 1 of the Landlord and Tenant Act, 1851," and one of those circumstances unquestionably is the death of the landlord—that is one instance of it. Take, for example, a case where a tenant for life grants a term longer than he is entitled to grant by the statutory provisions regulating his powers, that term would terminate at his death. Then the section says: "the tenant

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shall, instead of continuing in occupation as provided by that section until the expiration of the then current year of his tenancy continue in occupation until the occupation is determined by a twelve months' notice to quit expiring at the end of a year of the tenancy." There, I think, clearly "the then current year of tenancy" is used in reference to a tenancy which is not from year to year but for a longer and more definite period. It seems to me, therefore, that so far as that expression is concerned it is not sufficiently strong to override the very powerful contention to be derived from the use of the words "contract of tenancy" in s. 28, a term which is defined by s. 48, as I have already pointed out.

There is another consideration which also tends, I think, to confirm the view that I have so far taken of the section, and that is that s. 28 to some extent undoubtedly is in substitution for s. 22 of the Act of 1908. Sect. 22 of the Act of 1908 is the section which substitutes a year's notice in the cases mentioned for a half-year's notice where such notice is by law sufficient for the determination of a tenancy of a holding from year to year; in other words it applies only to tenancies from year to year. The contention, as I have already pointed out with regard to s. 28, is, that it also only applies to tenancies from year to year. If so, and if, as appears to be the case, s. 28 is to some extent, at all events, substituted for s. 22, it is difficult to understand why, if the Legislature intended to confine it to those tenancies to which s. 22 is applicable, it should have used that much wider expression, an expression which is wide enough to include tenancies for years as well as tenancies from year to year. So far, then, I think there is nothing in the section itself which prevents our coming to the conclusion at which I think we ought to arrive.

Then it is said further that there is another provision in the Act of 1920 which was intended to cover tenancies for years as distinct from tenancies from year to year, and that that section alone applies to such longer tenancies. That is s. 13. It does not apply to the particular tenancy, because this is what one might call "an old tenancy"—that is to say,

one created before the period mentioned in the Act. [His Lordship read s. 13 and continued:] It is perfectly true that up to this date no provision with regard to termination otherwise than by contract of tenancies, longer than tenancies from year to year, had been made, but there had from 1875 downwards been a succession of provisions with regard to tenancies from year to year, and what is said is, that s. 13 was intended to be the only provision relating to tenancies for a longer period than from year to year. There is a great deal in that contention, and at one time I was much impressed by it. But again, as in the case of this expression, "the then current year of tenancy," I cannot get over the strength of the expression "contract of tenancy" used in s. 28. There is no alternative except to say, and I see no ground for saying, that the Legislature has used that expression in a narrower sense than that in which by the definition clause it is said to be used.

With regard to a difficulty which has been suggested under s. 10 as to "compensation for disturbance," compensation for disturbance is granted under s. 10 in cases where a holding terminates by reason of a notice to quit given after a certain day. With regard to leases, the notice required by s. 13 is to be deemed to be a notice to quit for the purposes of the Act, and therefore the tenant who holds under a lease granted after the commencement of the Act of 1920 would be entitled to compensation for disturbance, because, although by contract his term expires by effluxion of time, yet by s. 13 it is not to terminate unless the notice thereby provided for, which is to be treated as a notice to quit, is given, and he would come within s. 10. On the other hand, in the case of an old lease, the tenant who holds on till the end of his term would not be entitled to compensation for disturbance. If we are right, however, I think the tenant whose term is determined by a twelve months' notice provided by s. 28 would be entitled to compensation for disturbance. The argument is, that there is here an anomaly to which the construction we have given to s. 28 gives rise. I am not very much impressed with that, and for this reason. If the term expires

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by effluxion of time—that is to say, in this case at the end of twenty-one years—the man knows that it is going to terminate, and there is less reason for giving him compensation for disturbance than there is in the case where it is determined at the end of some other year of the tenancy—in this case the seventh or the fourteenth year. At any rate any difficulty which may so be caused is certainly not enough to prevent our coming to the conclusion above expressed upon the words of s. 28, which expressly include every form of contract of tenancy.

I think, therefore, with all respect to the learned judges in the Divisional Court, that their judgment must be reversed, and judgment entered for the defendants.

ATKIN L.J. I agree. I find myself trying to give a plain meaning, the natural meaning, to the words used in the section, and giving that natural meaning to the words "contract of tenancy" I have to look at the definition in the Act of 1908. I see that that is wide enough to cover, as might have been expected, any contract of tenancy for years, or from year to year, or for life. I think that this lease was a contract of tenancy, and that the notice to determine the tenancy at the end of the seventh year was a notice to quit, because a notice to quit means nothing more than a notice to determine a tenancy, whether the tenancy is weekly or monthly or yearly or from year to year. If it is a notice to quit, it is a notice to determine, and vice versa, and therefore I think that this was a notice to quit. In these circumstances, it seems to me, that this is a statutory provision, that a notice to determine a tenancy of twenty-one years at the end of the seventh year is a notice to quit a holding, and therefore this notice was invalid because it purported to determine the tenancy before the expiration of twelve months from the end of the current year of the tenancy. It is said that we ought not to give their plain meaning to the words, but that we ought to assume that all that s. 28 does is to provide for a notice to quit in the case of a tenant of a holding from year to year, because it is said that the

previous provision in s. 22 of the Act of 1908, in respect of notices to quit, was limited to a tenancy from year to year. So it was, and it was more limited than that, because it only applied to such tenancies in respect of notices where a half-year's notice was necessary by law, and it did not apply at all where there was an express contract separate from that provision. It appears to me that s. 28 was quite plainly intended to repeal that provision in its entirety, and it substitutes in plain words the obligation that I have mentioned in any kind of contract, whether for years or not, and I see no reason at all to limit it to a tenancy from year to year. As has been pointed out in the series of Acts dealing with the same subject matter, if the Legislature mean tenancy from year to year they are quite able to say so, and do say so, and it will be found that s. 23 of the Act of 1908 begins: "Where a notice to quit is given by a landlord of a holding to a tenant from year to year," and I have no doubt that similar language would have been used in s. 28 if it had been intended. I think that the only right rule of construction is to give the plain meaning to the words, but certainly if we had to consider the intention of the Legislature we are not discouraged by the general nature of the legislation from giving them that meaning. For it appears to me reasonably plain that the Legislature in this Act were providing that the tenant should have a longer notice than six months' notice, whether he has contracted for it or not, and in the case of new tenancies, even where the term comes to an end by effluxion of time at a known period, still a twelve months' notice is to be given. It would be strikingly anomalous if in the case of a yearly tenancy commenced before the Act, and which we all of us know in agricultural matters may have started ten, fifteen, twenty, thirty or forty years before the Act, the tenant is entitled to a twelve months' notice in spite of the contract, while if he has taken a lease for twenty-one years, determinable at the end of seven years, he is not to have the full notice of twelve months but only six months. Therefore I think that s. 28 applies to this case.

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An objection was made as to the use of the term "current year of tenancy," and the use of those words has I think influenced the learned judges to come to the conclusion that the words "contract of tenancy" should be cut down. But they are not inconsistent with the application of the words to a lease. It appears to me that it might well be said that in respect of a lease for seven years, the first, second, third, fourth, fifth, sixth or seventh year is the current year of the tenancy during the time which it is running, and that that is a possible view, and was within the minds of those who drew this Act, is apparent from s. 14, which refers to the provisions of the Act of 1851 (14 & 15 Vict. c. 25), which is styled: "An Act to improve the Law of Landlord and Tenant in relation to emblements, to growing crops seized in execution, and to agricultural tenants' fixtures." Sect. 1 provides: "That where the lease or tenancy of any farm or lands held by a tenant at rackrent shall determine by the death or cesser of the estate of any landlord entitled for his life" and so on "the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit, upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means." Therefore I think that in the Act itself you find the use of the words "current year" applicable to a current year of a lease.

For these reasons, it appears to me that the appeal should be allowed. I have only to say in reference to s. 13, that it is not necessary for the purpose of this case to determine the meaning of that section, because it plainly does not apply to this tenancy, but at the present moment I have the greatest difficulty in seeing, where a lease has been granted for twenty-one years terminable at the end of seven or fourteen years on notice, that the seven years can be properly described within the words of the section as "the date fixed for the expiration of the term," because the section has reference to giving a notice to determine a lease, and how before the notice has been given to determine the lease

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at the end of the seventh year you can define a period of one year or two years from the date fixed, I cannot say. Two years or one year before the seventh year you do not know whether the term is going to expire or not, and it seems to me impossible to say that at the time you give that notice or before you give that notice, there is a date fixed for the expiration of the term. However it is unnecessary to determine that matter. I agree with what has been said by my brother Warrington that the result of our decision is that in this case there is a notice to quit, and if it had been a valid notice to quit there would have been a claim, or there might have been a claim to compensation under s. 10. That, of course, does not arise now. The appeal must be allowed, and judgment entered for the defendants with costs here and below.

Solicitors for appellants: *Ellis & Fairbairn, for Charsley & Reynolds, Slough.*

Solicitors for respondents: *Edell & Co.*

G. A. S.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1922 *Nov.* 9, 10.

C. A. 1923 *Feb.* 8, 9, 12; *March* 23.

ROSE AND FRANK COMPANY *v.* J. R. CROMPTON AND BROTHERS, LIMITED, AND OTHERS.

[1919. R. 1401.]

Contract—Animus Contrahendi—Agreement binding in Honour—Ousting the Jurisdiction—Repugnancy.

An English firm who manufactured and dealt in paper tissues of various kinds had for several years done business with an American firm. All goods of one kind sold in the United States, all goods of another kind sold in the United States or Canada, and all goods of a third kind wherever sold, were sold to the American firm, and that firm placed all orders for goods of the third kind with the English firm. These relations were at first made to continue for one year, but were renewed from time to time.

A great part of the tissues so sold were in fact manufactured by another English firm. In the course of time the American firm proposed a new arrangement, and a document was drawn up and signed by the three

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firms whereby the two English firms expressed their willingness that the present arrangements with the American firm, which were then for one year only, should be continued on the same lines for three years, and so on for another period of three years, subject to six months' notice by any of the parties. The document, after purporting to set out the understanding between the parties, including several modifications of their previous arrangement, proceeded in these words: "This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the law courts either in the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned to which they each honourably pledge themselves with the fullest confidence, based on past business with each other, that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation." Then followed a clause relating to prices.

The English firms having definitely determined these relations without notice, the American firm brought an action for breach of the contract alleged to be expressed in the document:—

Held, by Bankes, Scrutton and Atkin L.JJ., that the document did not constitute a binding contract and that the action would not lie.

The question whether, assuming the former relations were contractual, they were abrogated by the document, was left undecided.

Before relations between the parties had been broken off the plaintiffs had given and the defendants had accepted orders for goods. Some of these orders were executed; others were not.

Held, by Bankes and Scrutton L.JJ. (Atkin L.J. dissenting), that the orders and the acceptance thereof were alike referable to the document, and that the non-fulfilment of them did not constitute a breach of contract.

Judgment of Bailhache J. reversed.

APPEAL from the judgment of Bailhache J. in an action tried before the learned judge without a jury.

The action was for breach of an alleged contract in writing signed by the defendants respectively on July 11 and July 8, 1913, a counterpart of which was signed by the plaintiffs on August 12, 1913.

The plaintiffs were an American company carrying on business in New York. The defendants J. R. Crompton & Brothers, Ld., and Brittains, Ld., carried on business at Bury in Lancashire and at Cheddleton in Staffordshire respectively.

The facts were as follows: J. R. Crompton & Brothers, Ld., were manufacturers of carbonizing tissue paper. Messrs. Rose & Frank, who were later incorporated as the Rose & Frank Company, were merchants who dealt in this paper.

Business relations between these two firms began in 1905. J. R. Crompton & Brothers, Ld., sent the paper to Rose & Frank, who added some work by way of finishing it and sold it in America. The first arrangement between these parties was contained in a letter of March 7, 1905, written by J. R. Crompton & Brothers, Ld., to Rose & Frank in these terms: "As arranged with your Mr. Frank we now beg to confirm the arrangement made with him in regard to the 7 lbs. substance 'R & F carbonizing paper,' namely that in the event of your finding this paper suitable for your purpose we will confine the sale of it to you for the United States and Canada for the 12 months ending March 31, 1906." In December, 1908, a further arrangement was made between J. R. Crompton & Brothers, Ld., and Rose & Frank concerning another description of paper; and on December 24, 1908, J. R. Crompton & Brothers, Ld., wrote, "We discussed at some length with Mr. Campbell"—who represented Rose & Frank—"matters relating to carbon tissues, and have since then given some further thought to the matter, and agree now to your suggestion to confine for the time being our carbon tissues in America to you. By this we mean so long as this arrangement lasts we will open no new accounts in America for carbon tissues, in addition to which we will, in giving any quotation for such paper here, do our best to ascertain if the paper is or is not required for America, and where we find it is will bear your interest in mind and, so far as we can do so, decline to quote."

After these arrangements had been continuing for some years Rose & Frank found that there was a demand for carbonizing tissues of a blue colour, upon which on November 9, 1911, a further arrangement was made by a letter from J. R. Crompton & Brothers, Ld., to Rose & Frank containing these words: "Please take the paragraph in our letter 'this particular kind of blue paper in question' to mean all blue carbonizing tissue which we now agree to make only for your firm, upon the understanding that all your orders for such paper are given to us, subject to 12 months' notice on either side to terminate the agreement." The learned judge at the

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trial held that these arrangements were binding contracts, the effect of which was that Rose & Frank had the sole agency, not confined to the United States and Canada, of the blue carbonizing paper, subject to a twelve months' notice on either side, the sole agency of the 7 lbs. substance in the United States and Canada, subject to a similar notice, and the sole agency of all other carbonizing tissues in the United States only (with an exception in favour of one customer in Boston).

During the continuance of these relations, which were renewed from time to time and resulted in a profitable business to both parties, J. R. Crompton & Brothers, Ld., were in close commercial relations with Brittains, Ld., who produced paper tissues differing in quality from those of J. R. Crompton & Brothers, Ld., and a considerable quantity of the tissues supplied by J. R. Crompton & Brothers, Ld., to Rose & Frank, and to the Rose & Frank Company after its incorporation in March, 1911, were in fact manufactured by Brittains, Ld.; but there were so far no direct dealings between Brittains, Ld., and Rose & Frank or the Rose & Frank Company.

These relations continued until the end of 1912. Then the Rose & Frank Company, in order to give more permanence and stability to their business, proposed that an agreement should be drawn up between themselves, J. R. Crompton & Brothers, Ld., and Brittains, Ld., whereby the last named company should come into direct contractual relations with the Rose & Frank Company for a period of three years and thereafter for a further period of three years unless notice to the contrary were given by any of the parties to the others. An agreement to this effect dated January 1, 1913, was actually drafted but was never executed. (1)

Instead of that agreement the following document was drawn up. It was signed by Brittains, Ld., on July 8, and by J. R. Crompton & Brothers, Ld., on July 11, and a counterpart thereof was signed by the Rose & Frank Company on August 12, 1913. It was in these terms :—

(1) For a copy of this draft see note on p. 299, post.

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"As the business in carbonizing tissues which is now being done between Messrs. Rose & Frank Co. of New York as purchasers and Messrs. J. R. Crompton & Brothers Ld. of Bury, Lancashire, and Messrs. Brittains Ld. Cheddleton, Staffordshire, as manufacturers, has attained to a considerable volume, and Messrs. Rose & Frank Co. are of opinion that in the interests of the traders they represent assured arrangements for the supply of these papers should be made for some considerable period ahead, Messrs. J. R. Crompton & Brothers Ld. and Messrs. Brittains Ld. hereby express their willingness that the present arrangements with Messrs. Rose & Frank Co. for the sale of these papers, which are now for one year only, shall be continued on the same lines as at present for a period of three years, say until March 31, 1916, with the understanding that if it is desired by any of the three parties to alter or abrogate this arrangement at the expiration of that period six months' notice shall be given before that date. If no notice be given by either party the arrangement shall be regarded as continuing for a second period of three years subject to the same six months' notice for alteration or abrogation as in the first period of three years.

"The agreement between the three parties with respect to the business in carbonizing tissues is as follows, and any alteration or extension shall be subject to the mutual agreement of the three parties:—

"Messrs. J. R. Crompton & Brothers, Ld. with the consent and concurrence of Messrs. Brittains Ld. agree to confine the sale of all tissues for carbonizing exclusively to Messrs. Rose & Frank Co. as at present for the United States of America with the exception of:

"(1.) The F. S. Webster Co. of Boston, Mass. (whose business shall be left undisturbed as at present) but should the F. S. Webster Co. during the currency of this agreement offer for sale the paper they buy from Messrs. J. R. Crompton & Brothers Ld. in its unprepared state objection shall be raised to it by Messrs. J. R. Crompton & Brothers Ld., their assumption being that all the paper purchased

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from them by the F. S. Webster Co. is used by them in making carbon papers by their own plant; and

"(2.) The Dominion of Canada, where both Messrs. Rose & Frank Co. and Messrs. J. R. Crompton & Brothers Ld. shall be equally free to sell upon the arrangements at present existing between them,

upon the understanding that the Rose & Frank Co. will, as far as possible confine their purchases of all grades of carbonizing tissues so reserved to them by Messrs. J. R. Crompton & Brothers Ld. and Messrs. Brittains Ld. exclusively to Messrs. Crompton and Messrs. Brittains and, whilst doing their best to increase the business still further, undertake that the volume of business in the present grades shall not fall in any year below that of the average of the last three years, viz. 1910, 1911, and 1912, without such explanations as shall be considered satisfactory by Messrs. J. R. Crompton & Brothers Ld. and Messrs. Brittains Ld. Messrs. J. R. Crompton & Brothers Ld. and Messrs. Brittains Ld., whose position is in their opinion soundly assured, will subject to unforeseen circumstances and contingencies do their best, as in the past, to respond efficiently and satisfactorily to the calls of Messrs. Rose & Frank Co. for deliveries both in quantity and quality, and it is further understood and agreed that any other special and distinctive grades of paper for carbonizing which shall be made at the suggestion of or introduced by the Rose & Frank Co. shall during the currency of this agreement be confined exclusively to them for the United States of America and Canada without any exceptions otherwise than by common agreement between the three parties. It is understood and agreed that the cheaper carbonizing papers which have already been the subject of discussion shall be covered by the special and exclusive arrangement of this clause, but that the value of these or any fresh grades that may be introduced shall not be included in the average of the three years which applies only to the grades of paper supplied during the three years 1910, 1911, and 1912. The special R. & F. papers as hitherto

manufactured and supplied by Messrs. J. R. Crompton & Brothers Ld. are also included in this special exclusive arrangement as heretofore, the volume of business in these papers being governed by the clause for the three years average as in the case of the other grades.

"It is further clearly understood that the blue carbonizing tissues are absolutely and entirely reserved to Messrs. Rose & Frank Co. without any exceptions during the currency of this agreement.

"With the single exception of these blue carbonizing tissues this agreement applies only to the United States of America and Canada, and does not admit of these carbonizing papers being offered or sold by Messrs. the Rose & Frank Co. in their unprepared state outside the United States of America and Canada.

"This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the Law Courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned to which they each honourably pledge themselves with the fullest confidence, based on past business with each other, that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation.

"*Prices.*—Prices, (which on the present occasion are being advanced 10% after April 30, 1913, for the rest of the current year by mutual consent on account of the increased cost of production) shall in future be quoted for periods of six months' duration only. Any alterations in price which the manufacturers require on account of increases or decreases in cost of production shall take effect at the end of March and at the end of September in any year, notice of any alteration to be given by the end of the previous February or August respectively."

The arrangement contained in this document was extended to March 30, 1920. In May, 1919, the defendants J. R. Crompton & Brothers, Ld., and Brittains, Ld., became

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and there were express or implied terms thereof that the plaintiffs would act in the interests of the defendants as much as in their own interests and would charge reasonable prices to such traders and would do nothing calculated to jeopardize the sale of such tissues or by charging unduly high prices or otherwise to encourage the competition of rival manufacturers or dealers but would honourably and loyally co-operate with the defendants in developing the market for such tissues which terms the plaintiffs failed to observe as is hereinafter set out. . . . .

" 19. Alternatively if the defendants J. R. Crompton & Brothers Ld. made any of the agreements alleged in paragraphs 3, 4, 6 and 7 of the statement of claim all such agreements were determined by mutual consent by virtue of or at the date of the signing of the document referred to in paragraph 8 of the statement of claim "—i.e. the document of July, 1913.

" 20. If the defendants or either of them made any of the agreements alleged in paragraphs 3, 4, 6, 7, 8, 9 and 18 of the statement of claim there were in the said agreements the express or implied terms set out in paragraph 18 hereof and the plaintiffs were by the said agreements constituted the agents of the defendants and the plaintiffs in breach of the said agreements and of their duty as the defendants' agents acted contrary to the interests of the defendants in that they charged excessive prices to the traders in America and Canada who were their customers and thereby seriously prejudiced the sale of the defendants' tissues and involved the defendants in the danger of losing the whole or a part of their market in America and Canada and the defendants were justified in determining the agreement or agreements."

The defendants also counterclaimed 2124*l.* 18*s.* 8*d.* the reasonable price of tissues actually delivered on March 24 and April 3 and 17, 1919.

On February 8, 1922, an order was made in chambers that the action should be transferred to the Commercial List and that the Court should try all questions of liability, except the issue whether in fact the plaintiffs did any of

the acts alleged in para. 20 of the defence, and construe all agreements; and that all questions of damages and of the matters alleged in para. 20 of the defence (if they should become material) should be referred to an Official Referee.

The case was heard on November 9 and 10, 1922.

R. A. Wright K.C. and *Conway* for the plaintiffs.

Disturnal K.C., *Eastham K.C.* and *James Wylie* for the defendants.

Nov. 10. BAILHACHE J. [after stating the facts]. The question has been argued before me on the construction of the document of 1913 alone. Another question has been raised on the pleadings—namely, that if as a matter of construction the defendants were not at liberty to determine the arrangement as suddenly as they did, they were justified in so doing by the action of the plaintiffs. No evidence was called in support of this position; it is reserved for the defendants to make it good, if they can, by calling the necessary evidence. All I have now to deal with is the document of July, 1913.

The contest turns upon the clause which immediately precedes the statement of prices; it is in these words, "This arrangement is not entered into, nor is this memorandum written as a formal or legal agreement and shall not be subject to legal jurisdiction in the Law Courts either of the United States or England but it is only a definite expression and record of the purpose and intention of the three parties concerned to which they each honourably pledge themselves with the fullest confidence, based on past business with each other, that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation."

The point taken by the defendants is that the arrangement was not intended to be and was not a contract; that if I look at the whole of it and treat it as a whole I shall see plainly that the parties intended nothing in the nature of a binding contract, nothing more than a mutual understanding; that therefore it was quite open to them to

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provide that there should be no legal obligation on either party and consequently no recourse to the Courts of Law. On the other hand the plaintiffs also contend that if I take the document as a whole I must come to the conclusion that it was intended to be and is a binding contract which, apart from the clause I have read, would give either party a right of recourse to the Courts of Law if that contract was broken. Pursuing their argument they say where a contract binding in law is to be found in an instrument, if the parties in the same instrument violate that contract by a clause which stipulates that there shall be no legal liability on either side, that clause is void because it is repugnant to the terms of the instrument, and the contract remains. They say if that clause means that there is to be no legal liability on either side, the clause is repugnant, because it goes further than merely qualifying, it actually defeats the main purpose of the contract. They further say that if the clause means that there shall be no recourse to the Courts it is still void, because it is contrary to public policy to give effect to that intention.

I approach the construction of this document remembering that the business which these three parties carried on was a large, profitable and important business to them all, probably more important to the plaintiffs than to the defendants; that the relations between the plaintiffs and the defendants J. R. Crompton & Brothers, Ld.—Brittains, Ld., had not yet come into direct relation with the plaintiffs—were terminable, with one exception, upon a reasonable notice, and were not for any definite length of time; and that it was the wish of the parties, and particularly of the plaintiffs, to place the business upon a surer foundation.

Approaching the document with these facts in mind I find that it says: "As the business in carbonizing tissues which is now being done"—[The learned judge read the document to the words "as in the first period of three years," and proceeded:] As I have said that arrangement was definitely continued till March 31, 1920.

Pausing there a moment, I take it to be quite clear that

what they have agreed to in this first part of the memorandum is that the three contracts, which were only for one year and which were terminable on reasonable notice, were to be put on a different footing to this extent, that instead of being subject to reasonable notice, they were to continue for a period of three years, subject to six months' notice being given before that date, and for a further period of three years if no notice were given. It is quite clear that the parties intended not to weaken the existing contracts but to strengthen them; not to alter them except in this respect, that they should continue for a definite time and for a further period unless six months' notice were given to determine them. If the memorandum ended there I should not have the slightest doubt in saying this was as clear a contract as there could well be that the three contracts which were running should continue to run for a period of time.

The memorandum goes on: "The agreement between the three parties with respect to the business in carbonizing tissues is as follows, and any alteration or extension shall be subject to the mutual agreement of the three parties:—" In what follows the parties, as I gather their intention, are beginning to sweep into one document the provisions of the three letters which formed the three then existing contracts, and to express in that one document what the course of business is to be. The rest of the document reads exactly as I have suggested, except as regards some small matters, relating to such special and distinctive grades of paper as may be indicated by the plaintiffs, which were not comprised in the three letters. There is nothing in this portion of the memorandum to show that the contracts then existing should cease to be contracts and should become simply arrangements having no legal force or effect, an alteration which would be directly contrary to the plaintiffs' object not to weaken but to strengthen the ties which bound the defendants to them.

Then comes the clause which raises the question. If the first part of the document expresses an arrangement which is only to be binding in honour and not in law, a hope or

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expectation and nothing more, the clause undoubtedly excludes the jurisdiction of the Courts. But I have come to the conclusion that is not the proper way to read the document. I cannot think that three business firms have taken the trouble to write out a memorandum which is not to be worth the paper it is written on; that notwithstanding the fact that the three agreements were to be extended for three years certain, any of the parties might the day after signing this document have altered their minds and would yet have committed no breach of contract against the other or others. That seems to me an impossible position. It is difficult to understand how the plaintiffs allowed this clause to be inserted; but having come to the conclusion that the memorandum recites contracts which were then binding and binds the defendants to continue those contracts for three years, and then possibly for another three years, I have also come to the conclusion that, if this clause means that notwithstanding this the parties are to be under no legal obligation, then it is repugnant to the main intention of the memorandum and I must reject it. I must equally reject it if it merely purports to oust the jurisdiction of the Courts. My own view is that it has the larger meaning, that the parties shall be under no legal obligation to each other. That being so, and the earlier part of the document being contractual and not merely expressive of a hope or expectation, the clause, strange as it is and I think plain as it is, is repugnant to the main object and scope of the contract and must be rejected.

That disposes of the case so far as I am concerned; but if I am wrong, the plaintiffs have another and a smaller claim. At the end of January, 1919, before the defendants' sudden change of attitude, the plaintiffs had, as was their custom, sent orders for specific kinds and quantities of tissue paper based on their proximate requirements for the next three months or more. They claim that, whatever the document of July, 1913, may mean, those orders, which were accepted before the defendants put an end to that document, constitute contracts and must be fulfilled by the defendants. The defendants point out that there must be some memorandum

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in writing containing all the terms of these so-called contracts before they can be enforceable; that the acceptance is a simple acceptance of the orders as sent, and that the orders do not sufficiently give the terms to satisfy s. 4 of the Sale of Goods Act. The orders are all substantially in the same form: "Please enter our order for the following goods and ship as soon as possible Toronto, Canada"; then follows the description of the goods; then "Send all documents to our New York office. Price ." It is said that the contract between the parties contained terms which ought to be, and are not, inserted in the memorandum: First, that the mode of delivery is not stated; but the words are "Enter our order and ship." I understand that to mean "Deliver f.o.b." Next, that the prices are not specified; but no prices were definitely agreed; they were left to the defendants, which means that they were to be fair and reasonable in the circumstances. That is what the law implies when a contract is silent as to the price. Obviously such a contract may be made, and there can be no memorandum of that upon which the contract is silent. Therefore the fact that the price is not definitely mentioned does not matter. Thirdly, it is said that no time is named for payment; but the next words are "Send all documents to our New York office." If the goods were to be shipped f.o.b. I should take this to mean that payment would be made after the documents reach the New York office. That is precisely the course of business that was followed in this case. Therefore I have come to the conclusion that, if I am wrong upon the first point, there were sufficient memoranda in writing of the orders sent in January, 1919, to constitute those orders, when accepted, contracts for non-fulfilment of which the defendants must pay damages.

The formal judgment of the learned judge was drawn up as follows:—

(*a*) It was adjudged and declared that the agreement of July, 1913, mentioned in para. 8 of the statement of claim was a legally binding agreement against both defendants and that the orders mentioned in para. 18 of the statement of claim constituted legally binding

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contracts against the defendants J. R. Crompton & Brothers, Ld.;

(*b*) It was adjudged that judgment should be for the plaintiffs and that they should recover against the defendants the sum of 244*l.* 3*s.* 2*d.* mentioned in para. 17 of the statement of claim with costs of that issue up to the date of admission;

(*c*) It was ordered and directed that all other issues remaining to be tried and the issues as to damages should stand over for trial by Bailhache J. or, if he could not take it, by another judge taking the Commercial List; and that the plaintiffs should have the costs of the hearing in any event;

(*d*) It was adjudged that there should be judgment for the defendants J. R. Crompton & Brothers, Ld., on the counterclaim and that they should recover against the plaintiffs the sum of 2124*l.* 18*s.* 8*d.* with costs up to the date of admission;

(*e*) It was ordered and directed that the taxation of costs should stand over and that execution on the counterclaim should be stayed until the final judgment or further order;

(*f*) And it was further ordered that a commission should proceed to America to take evidence upon the issue raised in paras. 18 and 20 of the defence.

The defendants appealed against this judgment except paras. (*b*) and (*d*) thereof.

Sir John Simon K.C., *Eastham K.C.* and *James Wylie* for the appellants. The learned judge was wrong in holding that the document of July, 1913, constituted a binding contract. Not every agreement is a contract. A contract results from a combination of agreement and obligation. It is that form of agreement which directly contemplates and creates an obligation. The contractual obligation is that form of obligation which springs from agreement: Anson on Contract. (1) "The agreement must be, in our old English

(1) 14th ed. (1917), p. 2.

phrase, an act in the law: that is, it must on the face of the matter be capable of having legal effects. It must be concerned with duties and rights which can be dealt with by a Court of justice. And it must be the intention of the parties that the matter in hand shall, if necessary, be so dealt with, or at least they must not have the contrary intention. An appointment between two friends to go out for a walk or to read a book together is not an agreement in the legal sense: for it is not meant to produce, nor does it produce, any new legal duty or right, or any change in existing ones": Pollock, Principles of Contract. (1) "The agreement must purport to produce a legally binding result": Holland, Jurisprudence. (2) Thus if the scope or area of agreement does not include or contain submission to Courts of law and reference to legal standards and sanctions, and a fortiori if it excludes these, there is no contract. *Balfour* v. *Balfour* (3) is an example. There the wife of a man resident in Ceylon had to return to England for health; the husband agreed to allow her a certain sum per month during separation, and it was held that she could not sue him on this agreement for it was merely a domestic arrangement not intended to be legally binding. Taking the document of July, 1913, as a whole the parties have very clearly expressed their intention not to be bound legally by its terms.

The learned judge has held this expression of intention to be repugnant to the main scope and purpose of the document. No doubt a clause may be repugnant to the rest of a contract, and if it is, it has no effect, and the contract is still binding. For example in *Furnivall* v. *Coombes* (4) churchwardens covenanted to pay for repairs to the parish church with a proviso that they were not to be personally liable, but only as churchwardens, and it was held that the covenant to pay being a personal covenant the proviso was repugnant and void. Again in *Watling* v. *Lewis* (5) on the division of a partnership estate the trustees of one partner

(1) 9th ed. (1921), pp. 3, 4; and see note (*d*) on p. 4.
(2) 12th ed. (1916), p. 278.
(3) [1919] 2 K. B. 571.
(4) (1843) 5 Man. & G. 736.
(5) [1911] 1 Ch. 414.

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took as his share certain land subject to a mortgage, and covenanted "as such trustees, but not so as to create any personal liability on the part of them or either of them" with the trustee of the other partner to pay the mortgage debt and interest and to keep him indemnified from claims and demands on account thereof, and the covenantee having been called upon to make good a deficiency on the mortgage debt sued the surviving covenantor; and it was held that the defendant was personally liable. But where both parties express their intention to be bound not in law but in honour that intention is part of their agreement and cannot be said to be repugnant to it. The mistake the learned judge has made is in considering the document piece-meal. He has taken the first paragraph of the document and discovered in that an intention to strengthen the previous relations, which he holds to have been contractual relations, between the parties. But in the first place there never were any previous contractual relations between the respondents and Brittains, Ld. They were entitled to enter into such relations as suited them. In the second place there is considerable doubt whether the relation between the respondents and J. R. Crompton & Brothers, Ld., was contractual. Thirdly it is not to be inferred from the fact that the period of relations is extended that the arrangement is necessarily a binding agreement; and fourthly it is not a proper canon of construction to consider part of a document and, having inferred an intention from that part, discard as repugnant every indication to the contrary in the rest of the document: *Hussey* v. *Horne-Payne*. (1)

The invalidity of the document of July, 1913, as a legal contract does not involve the legal validity of the previous engagements. It is not admitted that they constituted binding contracts; that question has yet to be decided; but if they did the contracts were superseded by the document of 1913; for an agreement, though not a binding contract, may yet operate to rescind an existing contract:

(1) (1879) 4 App. Cas. 311, 316.

Morris v. *Baron & Co.* (1); *British and Beningtons* v. *North Western Cachar Tea Co.* (2)

The orders mentioned in para. 18 of the statement of claim were referable to the document of July, 1913, and their non-fulfilment involves no legal consequences.

R. A. Wright K.C. and *Conway* for the respondents. The argument for the appellants would preclude all possibility of repugnancy. If every clause in a document to which the parties set their hands contributes its part towards the resultant agreement, no clause can be repugnant to that agreement. But the doctrine that repugnant clauses must be rejected still exists: *Forbes* v. *Git.* (3) The words of a document are not of themselves the ultimate and conclusive test of the intention of the parties. The Court in gathering that intention does not confine itself to the words used: *Ford* v. *Beech* (4), per Parke B.; but considers also the relation between the parties and the circumstances in which the words are used. The same form of words may have one effect when used by a husband and wife and another when used by two business men seeking profit. What intention will the Court draw from the circumstances that J. R. Crompton & Brothers, Ld., were entitled to the whole output of Brittains, Ld.; that the respondents were the sole agents of the blue paper supplied by J. R. Crompton & Brothers and the sole agency in America and Canada of their 7 lbs. substance subject to a twelve months' or other reasonable notice? Was it their intention to renounce these profitable agencies for an agreement which might be terminated by a cable message at a moment's notice? Their intention was the opposite. It was, as the learned judge said, to strengthen not to weaken the ties that bound the appellants J. R. Crompton & Brothers, Ld., to them; and to bring themselves into direct relation with Brittains, Ld., and so obtain power to enforce the obligations of Brittains, Ld., to J. R. Crompton & Brothers. If that was the intention, then clearly the clause beginning "This

(1) [1918] A. C. 1.
(2) [1923] A. C. 48.
(3) [1922] 1 A. C. 256.
(4) (1848) 11 Q. B. 852, 866, 868.

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arrangement is not entered into" is repugnant to that intention and should be rejected ut res magis valeat quam pereat: *Furnivall* v. *Coombes* (1); *Williams* v. *Hathaway* (2); *Watling* v. *Lewis* (3); *Forbes* v. *Git* (4); *Scott* v. *Avery*. (5)

In executing the document of July, 1913, the parties never intended that the former contracts should be abrogated. Their intention was that those contracts should continue and be made more permanent and secure. The last thing they intended was that if the document failed as a contract its invalidity should infect the contracts it was designed to confirm and strengthen.

[BANKES L.J. The learned judge's view of that document made it unnecessary for him to decide whether the earlier arrangements, assuming them to have been contracts, were superseded. The question depends on the intention of the parties, a question of fact: *Noble* v. *Ward* (6); which we cannot decide without hearing evidence.]

Sir John Simon K.C. in reply. The question whether the arrangements before July, 1913, assuming they were contractual, were superseded by the document of that date is no doubt a question of fact; but the evidence on the question consists of correspondence between the parties and the effect of the document—matter which can very conveniently be considered in this Court. The changes introduced by that document lead to the inference that the former relations were abrogated. The introduction of Brittains, Ld., the continuance of relations for three years, the objection to be raised by J. R. Crompton & Brothers, Ld., if the Webster Co. of Boston should offer for purchase in its unprepared state paper which they have bought from J. R. Crompton & Brothers, Ld., the understanding that the respondents will confine their purchases to the appellants, the undertaking by the appellants as to the body of business to be done between the parties, the provision relating to the cheaper carbonizing papers, and the alteration in prices and in the period for which prices are

(1) 5 Man. & G. 736.
(2) (1877) 6 Ch. D. 544.
(3) [1911] 1 Ch. 414.
(4) [1922] 1 A. C. 256.
(5) (1856) 5 H. L. C. 811.
(6) (1867) L. R. 2 Ex. 135.

to be quoted; these numerous provisions lead to one conclusion, that the former relations were terminated and that a new course of business was to take their place.

Cur. adv. vult.

March 23. The following written judgments were delivered :—

BANKES L.J. This is a curious case. The plaintiffs carry on business in New York as dealers in carbonizing papers, and the defendants are manufacturers of this class of papers in this country. For a number of years before July, 1913, the plaintiffs and the defendants, Cromptons, had done business together in the export of these papers to the United States. The terms upon which the business was carried on are referred to in correspondence which passed between the two firms. It is a matter in dispute whether this correspondence constituted a contract, or a series of contracts, between these parties—this is a matter which has yet to be tried—but for the purpose of my judgment, and in order to test the main question from the point of view most favourable to the respondents, I will assume (without deciding) that these business relations at that time between these parties were contractual relations, using that expression in its strict legal sense as involving a legal liability upon the parties to perform their agreements. A quantity of the paper supplied by the defendants Cromptons to the plaintiffs was manufactured by the defendants Brittains. In the early part of 1913 the plaintiffs were apparently anxious to get into direct business relations with the defendants Brittains, and to secure some assurance of a longer continuance of business relations than they at that time had with the defendants Cromptons. A draft of an agreement was prepared, apparently by the plaintiffs, or on their behalf, which bears date January 1, 1913. (1) The parties appear to have worked on this draft, and by the end of June, or the beginning of July, the three parties had agreed upon the terms of the

(1) See note on p. 299, post.

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document upon which the main question in the action turns. The plaintiffs allege that the document is a contract in the strict sense of the word, involving each of the parties to it in a legal obligation to perform it. The defendants, on the other hand, say that the document is nothing of the kind, because it expressly provides that it shall not involve any of the parties in any legal obligation to perform any of its terms. There is, I think, no doubt that it is essential to the creation of a contract, using that word in its legal sense, that the parties to an agreement shall not only be ad idem as to the terms of their agreement, but that they shall have intended that it shall have legal consequences and be legally enforceable. In the case of agreements regulating business relations it follows almost as a matter of course that the parties intend legal consequences to follow. In the case of agreements regulating social engagements it equally follows almost as a matter of course that the parties do not intend legal consequences to follow. In some cases, such as *Balfour* v. *Balfour* (1), the law will, from the circumstances of the case, imply that the parties did not intend that their agreement should be attended by legal consequences. It no doubt sounds in the highest degree improbable that two firms in this country, arranging with a firm in the United States the terms upon which a very considerable business should be carried on between them over a term of years, should not have intended that their agreement as to those terms should be attended by legal consequences. It cannot however be denied that there is no reason in law why they should not so provide, if they desire to do so. The question therefore in the present case resolves itself into a question of construction. I see nothing in the surrounding circumstances which could justify an interpretation of the language used by the parties in the document of July, 1913, in any other than its ordinary meaning. The document itself is a curious one from a drafting point of view. A skilled draftsman could easily have rendered the discussion which has taken place in the Court below and in this Court impossible. As it is, the draftsman

(1) [1919] 2 K. B. 571.

appears at times to have remembered, and at times to have lost sight of, the object he is alleged to have had in view. For instance, the document opens with a clause apparently studiously worded to avoid the usual appearance of a contract. The draftsman then adopts language which at times is strongly suggestive of a contract, and at times indicates something other than a contract. Then follows what is said to be the governing clause, and the document concludes with language suggestive of a contract. What I have called the governing clause is not couched in legal phraseology. A great deal more is said than need have been said in order to record the intention of the parties. I read it as a genuine attempt by some one not a skilled draftsman to go much further than merely providing a means for ousting the jurisdiction of the Courts of law. There is no ground for suggesting that the language used in the clause is not a bona fide expression of the intention of the parties. If so, it appears to me to admit of but one construction, which applies to and dominates the entire agreement. The intention clearly expressed is that the arrangement set out in the document is only an honourable pledge, and that all legal consequences and remedies are excluded from it. If this is the true construction of the clause, it must govern the entire arrangement, and there is consequently no room for the principle upon which the learned judge decided this part of the case. It would no doubt have simplified matters if the clause in question had been inserted at the head of the document, or even at the end, rather than in the position it occupies. I attribute its position to the want of that skill in drafting of which the document affords plenty of evidence, rather than to any want of bona fides in the language used. Once it is established that the language of the clause is the bona fide expression of the intention of the parties, the matter is in my opinion concluded, and it becomes manifest that no action can be maintained upon the agreement contained in the document of 1913.

The next point which arises for decision is whether the pre-1913 arrangements are still in existence, and if in

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existence, whether they are enforceable. The point was partly argued before us, and reference was made to *Noble* v. *Ward* (1) and to what Willes J. there said in reference to rescission of one agreement by the substitution of another. His view of the law that the question would be one for a jury was cited with approval in *Morris* v. *Baron & Co.* (2) When this point was urged before us, we did, I think, intimate to counsel that this point must be tried, and that we did not propose to decide it. Whether this was a wise decision on our part I am not prepared to say, but after consideration I am satisfied that it is better to leave the matter as it stands than to direct any further argument upon it.

The last point involved in the appeal is as to the so-called orders referred to in para. 18 of the statement of claim. Bailhache J. has decided that these orders were accepted by the defendants Cromptons, and when accepted became contracts legally binding upon these defendants, though not upon the defendants Brittains. The bulk of these orders were given in January, one in February, and the rest in March, 1920. It appears from the correspondence that in December of 1918 the defendants Cromptons were applying to the plaintiffs as to their probable requirements for the coming year, because when they were ascertained Messrs. Brittains "would do their best to make the most helpful arrangements possible." (See Cromptons' letter, December 3.) On January 23, 1919, the plaintiffs write to Messrs. Brittains saying that they had not made up their season's orders, as they were awaiting Messrs. Brittains' view of the situation and the probabilities of the quantities that they could furnish for the coming year. On the next day, the 24th, the plaintiffs send to the defendants Cromptons twenty-four orders for papers of Brittains' make, and eight orders for papers of Cromptons' make, and on the same day they send to the defendants Brittains copies of the orders for their make of paper sent to the defendants Cromptons, and they end their letter as follows: "We have made no mention of price, as we take it for granted that you will adjust

(1) L. R. 2 Ex. 135. (2) [1918] A. C. 1.

these in accordance with conditions which we hope are such that there will be no further advance, but probably gradual reduction." On February 7 the plaintiffs write to the defendants Cromptons inclosing one order for their make of paper, and telling them that they were awaiting advice from Messrs. Brittains "as to the possibility of production during the coming year." On February 12 the defendants Cromptons acknowledge the receipt of the plaintiffs' letter of January 24 containing the thirty-two orders. The letter is in these terms: "Dear Sirs, we beg to acknowledge receipt of your favour of the 24th ulto., contents of which are duly noted. We also thank you for the 24 orders for 286 cases of Messrs. Brittains' papers, and 8 orders for 64 cases of our paper, to all of which we will give our best attention, and Messrs. Brittains write us with regard to the orders for their papers that they are endeavouring to let you have deliveries this year up to at least the full 100% for the standard year ending February 28, 1918, but that at the moment conditions are particularly uncertain. Nevertheless, they would like us to assure you that they would give their most careful attention to your requirements, and endeavour to let you have the fullest output they possibly can, and they add that time will make the position clearer." During all this time the parties were discussing the period for which the 1913 arrangement was to continue, and on March 11 the plaintiffs in their letter of that date, which enclosed the last six orders relied on, say this: "We agree with the suggestion of Messrs. Brittains acquiesced in by you, that the agreement between us be extended to March 30, 1920, and that notice to amend or terminate the agreement must be definitely given by any of us before September 30, 1919."

Under these circumstances it appears to me manifest that these so-called orders were really requisitions under the existing 1913 agreement, intended to be orders to be executed by both the defendants under that agreement, the acknowledgment of the receipt of which by the defendants Cromptons did not give them the contractual force against one of the two defendants only which, but for the existence of the agreement,

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they might certainly have had. Had the orders been executed, the price at which they would have been executed would have been regulated by the terms of the 1913 agreement, and this is no doubt what the plaintiffs had in mind when they wrote their letter of January 24. No case is made by the plaintiffs that the defendants or either of them are bound by any estoppel in relation to these orders, or any of them. The case made is a simple one of offer and acceptance.

For the reasons I have given, I think that this case fails. The appellants in my opinion succeed both on the point as to the legal effect of the document of July, 1913, and as to the legal effect of the orders mentioned in para. 18 of the statement of claim, and the judgment of Bailhache J. must be varied by making the declaration contained in the first paragraph of the formal judgment in the negative instead of in the affirmative on both points, and the appellants must have the costs of this appeal and in the Court below of the two issues on which they have now succeeded, and the stay upon the taxation of costs, so far as it relates to those issues, must be removed. In other respects, the judgment of the Court below is to stand.

SCRUTTON L.J. The facts giving rise to the present dispute are clearly stated by Bailhache J., and I do not repeat them. Down to 1913 there were agreements between Messrs. Rose & Frank Co. in the United States and Messrs. Crompton in England which in my opinion gave rise to legal relations, though owing to the vagueness of the language used there might be considerable difficulty in ascertaining with exactitude what those legal relations were. In 1913 the parties concurred in signing a document which gives rise to the present dispute. I agree that if the clause beginning "This arrangement" were omitted, the Courts would treat the rest of the agreement as giving rise to legal relations, though again of great vagueness. An agreement that Messrs. Brittain & Crompton "will subject to unforeseen circumstances and contingencies do their best, as in the past, to respond efficiently and satisfactorily to the calls of Messrs. Rose & Frank Co. for

deliveries both in quantity and quality," is not very helpful or precise. But the clause in question beginning "This arrangement" is not omitted and reads as follows: "This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the Law Courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned to which they each honourably pledge themselves with the fullest confidence, based upon past business with each other, that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation." The judge below thinks that by itself this clause "plain as it is" means that the parties shall not be under any legal obligation to each other at all. But coming to the conclusion that without this clause the agreement would create legal obligations, he takes the view that the clause must be rejected as repugnant to the rest of the agreement. He also holds that if the clause merely means to exclude recourse to the Law Courts as a means of settling disputes, it is contrary to public policy as ousting the jurisdiction of the King's Courts.

In my view the learned judge adopts a wrong canon of construction. He should not seek the intention of the parties as shown by the language they use in part of that language only, but in the whole of that language. It is true that in deeds and wills where it is impossible from the whole of the contradictory language used to ascertain the true intention of the framers, resort may be had, but only as a last expedient, to what Jessel M.R. called "the rule of thumb" in *In re Bywater* (1) of rejecting clauses as repugnant according to their place in the document, the later clause being rejected in deeds and the earlier in wills. But before this heroic method is adopted of finding out what the parties meant by assuming that they did not mean part of what they have said, it must be clearly impossible to harmonize the whole of the language they have used.

(1) (1881) 18 Ch. D. 17, 20.

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Now it is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement concluded does not give rise to legal relations. The reason of this is that the parties do not intend that their agreement shall give rise to legal relations. This intention may be implied from the subject matter of the agreement, but it may also be expressed by the parties. In social and family relations such an intention is readily implied, while in business matters the opposite result would ordinarily follow. But I can see no reason why, even in business matters, the parties should not intend to rely on each other's good faith and honour, and to exclude all idea of settling disputes by any outside intervention, with the accompanying necessity of expressing themselves so precisely that outsiders may have no difficulty in understanding what they mean. If they clearly express such an intention I can see no reason in public policy why effect should not be given to their intention.

Both legal decisions and the opinions of standard text writers support this view. In *Balfour* v. *Balfour* (1) the Court declined to recognize relations of contract as flowing from an agreement between husband and wife that he should send her 30*l.* a month for her maintenance. Atkin L.J., speaking of agreements or arrangements between husband and wife involving mutual promises and consideration in form, said "They are not contracts because the parties did not intend that they should be attended by legal consequences." In the early years of the war, when a member of a club brought an action against the committee to enforce his supposed rights in a club golf competition, I non-suited him for the same reason, that from the nature of the domestic and social relations, I drew the inference that the parties did not intend legal consequences to follow from them: *Lens* v. *Devonshire Club*. (2) Mr. Leake says (3) that "an agreement as the source of a legal contract imports that the one party shall be bound to some performance, which the latter (sic) shall have a legal right to enforce." In Sir Frederick Pollock's

(1) [1919] 2 K. B. 571.
(2) Unreported. See The Times Newspaper, December 4, 1914.
(3) 7th ed. (1921), p. 3.

language (1) an agreement to become enforceable at law must "be concerned with duties and rights which can be dealt with by a court of justice. And it must be the intention of the parties that the matter in hand shall, if necessary, be so dealt with, or at least they must not have the contrary intention." Sir William Anson requires in contract "a common intention to affect" the legal relations of the parties.

Judged by this test, I come to the same conclusion as the learned judge, that the particular clause in question shows a clear intention by the parties that the rest of their arrangement or agreement shall not affect their legal relations, or be enforceable in a Court of law, but in the words of the clause, shall be "only a definite expression and record of the purpose and intention of the three parties concerned to which they each honourably pledge themselves," "and shall not be subject to legal jurisdiction." If the clause stood first in the document, the intention of the parties would be exceedingly plain.

The cases cited to us to the contrary were cases in which the form of the other part of the document, as a covenant in a deed, or a grant of a right in property in legal terms, clearly showed an intention to create a legal right, and where subsequent words, purporting not to define but to negative the creation of such a right, were rejected as repugnant. In *Ellison* v. *Bignold* (2), where the parties under seal "resolved and agreed and did by way of declaration and not of covenant spontaneously and fully consent and agree," Lord Eldon laid aside "the nonsense about agreeing and declaring without covenanting." An agreement under seal is quite inconsistent with no legal relations arising therefrom. And in the present case I think the parties, in expressing their vague and loosely worded agreement or arrangement, have expressly stated their intention that it shall not give rise to legal relations, but shall depend only on mutual honourable trust. This destroys the decision of Bailhache J. so far as it is based on the view that the document of 1913 gives rise to legal rights which can be enforced.

(1) 9th ed. (1921), p. 3. (2) (1821) 2 Jac. & W. 503, 510.

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It was unnecessary for the judge below to decide the next point, whether, if the 1913 document gave rise to no legal rights, the earlier agreements which contained no similar clause could be enforced. This turned on whether the parties in coming to the agreement of 1913 intended to rescind the earlier agreements except in so far as they were incorporated in the new agreement, and even then only to continue them as honourable obligations. It follows from *Morris* v. *Baron & Co.* (1) that a valid contract may be rescinded by an agreement unenforceable in law, the test being whether the parties intend to rescind the old agreement, replacing it by a new agreement which may incorporate many of the old terms, or merely to vary the old agreement which remains effective except in so far as it is varied: see per Lord Sumner, *British and Beningtons* v. *North Western Cachar Tea Co.* (2) *Morris* v. *Baron & Co.* (1) also says that the intention of the parties would be a question of fact, though the House of Lords themselves decided the question of fact: see per Lord Haldane. I have carefully considered the documents and the forcible argument of Sir John Simon on this point, and have come to the conclusion that the parties who transformed a contract between two parties into an honourable arrangement between three parties incorporating some parts of the old arrangement, varying others, and adding fresh terms, clearly intended to abandon or rescind the old arrangement and leave their relations depending on the new honourable understanding of 1913. Any alternative claim on the documents before 1913 therefore fails.

I should have been prepared, if the other members of the Court had thought it right, to hear counsel for the respondents further on this point. We intimated during their argument that we were with them on this point, but this, of course, could not be final as we had not then heard Sir John Simon in reply. On hearing him I was much impressed by his argument, though I needed to look at the documents carefully to form a final opinion. I made a mistake in not asking Mr. Wright to complete his argument, and should

(1) [1918] A. C. 1, 21. (2) [1923] A. C. 67.

have been ready to rectify it by hearing any further arguments he wished to add; but as my Lord thinks it better to have a new trial on this point, I can only say that my own opinion is as above stated. Though rescission is a question of intention and therefore of fact, the House of Lords decided it in *Morris* v. *Baron & Co.* (1) without sending the matter for a new trial. What the document containing the engagement of honour means is not a question on which evidence is admissible; nor is the question what the earlier letters mean; and what the two together mean can, I think, be decided without further evidence. Nor am I impressed by the argument that Bailhache J. reserved further questions to himself. He did not intend to decide this question at any time, for his original decision had rendered it unnecessary. If it rested with me, I should decide the question in favour of the appellants.

The remaining question is the claim in para. 18 of the statement of claim, for damage for the non-delivery of the whole of the undelivered part of the goods said to be legally due under some thirty-two specified orders. As to these, a question was raised by the defendants at the trial under the Sale of Goods Act, 1893, which was abandoned before us. The judge below, deciding that the agreement of 1913 was legally enforceable, held that any facts giving a legal answer under the agreement would also give a legal answer to the claim under the separate orders. But he said that had he held the arrangement of 1913 not enforceable in law he would have held that a legal claim arose under the specific orders. As I have held the agreement of 1913 not enforceable in law, I have now to consider the position of the separate orders. For if they were given under an unenforceable arrangement, they may so far as not executed partake of the character of the overriding agreement under which they came into existence.

The clause in the agreement of 1913 relating to the supply of goods to Messrs. Rose & Frank for which they have the sole agency in the United States appears to run as follows:

(1) [1918] A. C. 1, 21.

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Rose & Frank agree that the volume of business in any year shall not fall in any year below the average of three years, 1910 to 1912, "without such explanations as shall be considered satisfactory" by Cromptons and Brittains. The latter two firms on their part agree that they will "subject to unforeseen circumstances and contingencies do their best . . . . to respond efficiently and satisfactorily to the calls of Messrs. Rose & Frank Co. for deliveries both in quantity and quality." Accordingly in December, 1918, the English manufacturers are asking for Rose & Frank's "prospective requirements," and on January 24, 1919, Messrs. Rose & Frank send some thirty-two orders for deliveries, for various dates, some as far ahead as October 1, 1919. They say they have not yet determined the full quantity of paper they will require in the year, but send orders which will cover part of their wants. Messrs. Crompton, on February 12, 1919, write a letter which appears to me fully to carry out the vague arrangements in honour which I have held to be constituted by the arrangement of 1913, but, as made under that arrangement in honour, to give rise to no legal obligation. It runs as follows: "We beg to acknowledge receipt of your favour of the 24th ulto. contents of which are duly noted. We also thank you for the 24 orders for 286 cases of Messrs. Brittains papers, and 8 orders for 64 cases of our paper, to all of which we will give our best attention, and Messrs. Brittains write us with regard to the orders for their papers that they are endeavouring to let you have deliveries this year up to at least the full 100 per cent. for the standard year ending February 28, 1918, but that at the moment conditions are particularly uncertain. Nevertheless they would like us to assure you that they would give their most careful attention to your requirements, and endeavour to let you have the fullest output they possibly can, and they add that time will make the position clearer." This I cannot construe as a binding acceptance of a legal proposal. It is, in my opinion, an assurance that the suppliers will do their best to comply with the probable requirements of the agents, but do not bind themselves as conditions are particularly uncertain. So far as delivery was made and

accepted, legal consequences as to payment of price would follow, but I think there is no legal remedy for non-delivery.

In my view, therefore, the judgment of Bailhache J. ordering that the issue of liability for damages under the "legally binding agreement" of 1913 and the special orders shall be tried by himself, should be reversed.

The judgment for 224*l.* 3*s.* 3*d.* for the plaintiffs, and 2124*l.* for the defendants with costs stand. The defendants should have the costs of the hearing to date here and below.

ATKIN L.J. The first question in this case is whether the document signed by the defendants on July 11, 1913, with a counterpart signed by the plaintiffs on August 12, 1913, constituted a contract between the parties. To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly. Such an intention ordinarily will be inferred when parties enter into an agreement which in other respects conforms to the rules of law as to the formation of contracts. It may be negatived impliedly by the nature of the agreed promise or promises, as in the case of offer and acceptance of hospitality, or of some agreements made in the course of family life between members of a family as in *Balfour* v. *Balfour*. (1) If the intention may be negatived impliedly it may be negatived expressly. In this document, construed as a whole, I find myself driven to the conclusion that the clause in question expresses in clear terms the mutual intention of the parties not to enter into legal obligations in respect to the matters upon which they are recording their agreement. I have never seen such a clause before, but I see nothing necessarily absurd in business men seeking to regulate their business relations by mutual promises which fall short of legal obligations, and rest on obligations of either honour or self-interest, or perhaps both. In this agreement I consider the clause a dominant clause, and not to be rejected, as the learned judge thought, on the ground of repugnancy.

(1) [1919] 2 K. B. 571.

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I might add that a common instance of effect being given in law to the express intention of the parties not to be bound in law is to be found in cases where parties agree to all the necessary terms of an agreement for purchase and sale, but subject to a contract being drawn up. The words of the preliminary agreement in other respects may be apt and sufficient to constitute an open contract, but if the parties in so agreeing make it plain that they do not intend to be bound except by some subsequent document, they remain unbound though no further negotiation be contemplated. Either side is free to abandon the agreement and to refuse to assent to any legal obligation; when the parties are bound they are bound by virtue only of the subsequent document. On this, the main question, I agree with the judgments of the other members of the Court.

The plaintiffs have an alternative claim against the defendants, J. R. Crompton & Bros., Ld. They say that before 1913 they had been for years doing business with these defendants on the terms of binding agreements terminable on notice, and that if the arrangements made in August, 1913, did not result in contractual relations, the contracts in existence at that date have never been terminated, and they sue for their breach. The defendants, Cromptons, by their defence, para. 12, content themselves with a denial that the agreements in question were in force in 1919, the date of the alleged breach. They do not allege notice to terminate; nor do they allege rescission, as I think technically they should; but their case in substance is that the former agreements were rescinded by mutual consent when the arrangement of August, 1913, was made. If the document of August, 1913, were a contract, there would, I think, be no doubt that the true inference in law would be that by entering into fresh contractual obligations covering the whole field of the former contracts, the parties must be taken to have agreed to rescind the former contracts. But we have now to assume that there were no contractual obligations undertaken in 1913, and the question is, What was the effect of the new arrangement upon existing contracts?

This seems to me to be the point reserved by Lord Atkinson in *Morris* v. *Barron & Co.* (1), where he is considering the effect upon a written contract for the sale of goods of a subsequent parol contract inconsistent with the terms of the first. "If the parol agreement were absolutely void it might possibly be otherwise; but owing to the terms of s. 4 of the Sale of Goods Act, 1893, this latter question does not arise in this case, and it is not, in my view, necessary to decide it." There seems to be no difference in principle between a void contract and an agreement which is not a contract; the essence of the matter is that in neither case do the purported stipulations result in legal obligations.

The question raised appears to me difficult. I think it quite conceivable that a man whose express object was that "assured arrangements should be made for the supply of paper for some considerable period ahead" might assent to an honourable understanding extending the period of agency, but might be unwilling to relinquish the only substantial rights he had in his existing agreements; and I think the repeated reference in the record of the honourable understanding to the continued existence of present arrangements would encourage this view. On the other hand, I also think it conceivable, though I personally should think it improbable, that a man having the avowed object referred to would abandon his legal rights for the benefits he hoped to get under the new arrangement. But whatever the true view is, I am of opinion that this Court is not in a position to decide the question for three reasons.

It is plain from the decision in *Morris* v. *Baron & Co.* (2), adopting the judgment of Willes J. in the Exchequer Chamber in *Noble* v. *Ward* (3), that the question of rescission is a question of fact; in *Noble* v. *Ward* (3) a question for the jury: see per Lord Finlay (4) and Lord Haldane. (5) On this question of fact I do not think we are sufficiently informed of the relevant circumstances to pronounce. It

(1) [1918] A. C. 1, 30.
(2) [1918] A. C. 1.
(3) L. R. 2 Ex. 135.
(4) [1918] A. C. 10.
(5) [1918] A. C. 18.

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would be necessary to consider what the actual existing contracts were, as constituted by letters and modified, if at all, by subsequent correspondence and course of business. It would be further necessary to consider the circumstances under which the arrangement of July, 1913, was made, and the conduct of the parties under it. The question, though raised in the pleadings and mentioned to the learned judge, was not considered by him, as his construction of the contract made it unnecessary. Some, but very few, of the relevant letters were read before us, the discussion being limited on behalf of the plaintiff for the reason hereinafter given. Under the circumstances, I should come to the conclusion that this matter should be ordered to be retried, even if the two following considerations were not, as I think they are, conclusive.

The judgment in this case provides for a declaration that the agreement of July, 1913, is a legally binding agreement, and that the orders mentioned in para. 18 of the statement of claim constitute legally binding contracts against the defendants, Crompton & Bros., Ld., and then provides that all other issues remaining to be tried should stand over for trial by Bailhache J. or other judge taking the Commercial List. This latter provision gave effect to the agreement of the parties expressed at the trial after the judgment was given. If the learned judge's judgment is reversed as to the declaration of the validity of the agreement of July, 1913, the point as to rescission is an issue remaining to be tried. It never has been tried by the learned judge and, in my opinion, should be tried by him, or some other judge taking the Commercial List, according to the terms of the judgment, and should not be tried by the Court of Appeal.

On the hearing of the appeal we stopped Mr. Wright, counsel for the plaintiff on this point, and intimated that we should send the action back to the learned judge for hearing on the question of rescission. Sir John Simon, in reply, adduced reasons why we should decide this point in his clients' favour, but he did not, as far as I am aware, alter our decision, and Mr. Wright was given no opportunity to discuss

the matter further. I can see no justification under the circumstances for deciding the point in this Court, and I agree with the judgment of Bankes L.J. in this respect.

The question of the orders given in 1919 requires separate consideration. I myself am at a loss to understand how the provisions of the arrangement of 1913, whether binding or not, affect the matter. The general relation of the parties was that the plaintiffs were to be the sole vendors of the defendants' goods in the United States of America. Agreements constituting one party sole selling agent in a defined area of the other party's goods are, of course, common. Their special provisions vary; often the agent enters into a correlative obligation that he will not sell within his area any other maker's goods of similar description. Sometimes the manufacturer is under no legal obligation to sell any or any particular amount of goods to the selling agent; sometimes the agent succeeds in putting him under such an obligation. In this case the defendants by the honourable understanding entered into the vague engagement contained in the document which had as a basis the average turnover for the last three years before the agreement. But whatever the terms of the agreement or understanding, it contemplated, as nearly all such agreements do, that the actual business done under it should be done by particular contracts of purchase and sale upon the terms of the general agreement so far as applicable. The actual business was done in this case, as in countless others, by orders for specific goods given by the "agent" and accepted by the manufacturer or merchant. To see whether the orders given were accepted, the terms of the alleged acceptance have to be regarded. In this case I find that after a correspondence as to the possible requirements of the plaintiffs for the whole of the year, the plaintiffs, on January 24, 1919, write: "We have not yet determined the full quantity of paper that we will require from you and Brittains, but realizing that you have no special orders from us, we are sending you orders enclosed which will cover part of our wants for the year 1919." Enclosed were orders all addressed to Messrs. Cromptons: "Please enter our order for

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the following goods and ship . . . . to us at . . . ." The blanks were all filled up by various directions, " When convenient," " As soon as possible," February 1, March 1, April 1, up to December 1, 1919, and the destination was either New York or Toronto. The price and terms are left blank, and I agree with the learned judge that these are sufficiently defined by the course of business between the parties. No question arises before us as to the provisions of s. 4 of the Sale of Goods Act, as it was expressly waived by counsel for the defendants. The order proceeds: " Kindly acknowledge and state when you will ship." The last words obviously mean " Advise us when the time comes of any proposed shipment." The answer is on February 12, 1919: " We . . . . thank you for the 24 orders for 286 cases of Messrs. Brittains' papers and 8 orders for 64 cases of our paper, to all of which we will give our best attention." Pausing there, this is the common formula of acceptance in the business world which has been treated as acceptance in countless cases since merchants first wrote to one another. It would be understood as an acceptance passing between two merchants where there was no obligation at all on the part of the vendor to accept. Why it should bear a different meaning in a case where there is an honourable understanding by the merchant to accept up to some vague limit, I am unable to understand. The letter continues, " and Messrs. Brittains write us with regard to the orders for their papers that they are endeavouring to let you have deliveries this year up to at least the full 100 per cent. for the standard year ending February 28, 1918, but that at the moment conditions are particularly uncertain." This seems to me to relate to the business likely to be done over the whole year, and particularly to the plaintiffs' statement in the letter of January 24, 1919, under reply that they had not yet determined the full quantity of paper that they would require, and that they would send on further orders later. I read the whole letter as saying " We definitely accept these orders, and as to further orders for Brittains' paper we expect to be able to execute them up to the 1918 quantity, but this is not certain." I cannot think that any business

man receiving the letter of February 12 would understand that the writers were making their acceptance conditional on Brittains choosing to supply the goods. If Messrs. Cromptons meant to convey that after using the previous formula, they should have used much more definite language. The remaining orders are order 4661, an order for goods "as soon as possible," sent on February 7 and accepted on February 25: "We thank you for your order . . . . and we will endeavour to get this through during the next three or four weeks," and six further orders for Brittains' paper sent on March 11, three "at once," and three for July 1 accepted on March 29, 1919: "We thank you for the six orders for Messrs. Brittains' paper which we have passed on to them, and the same will have their best attention." It may be noticed that some of the orders so sent, and, as I think, so accepted, were in fact executed. The dispute is as to the large balance that remained unexecuted. In my view this is a very plain case of acceptance of a written order, and I entirely agree with the judgment of Bailhache J. on this part of the claim. I should vary the order of Bailhache J. by declaring that the agreement of July, 1913, is not a legally binding agreement, but otherwise I should leave the order as it is, allowing the question of rescission to be tried under the order as one of the "other issues remaining to be tried," and I think that there should be no costs of the appeal, but as the other members of the Court have come to a different conclusion, the order will be as proposed by them.

Appeal allowed.

Solicitors for appellants: *Rawle, Johnstone & Co., for Addleshaw, Sons & Latham, Manchester.*

Solicitors for respondents: *Collins & Crosse.*

NOTE.

The draft agreement of January 1, 1913, mentioned above:—

Agreement made and entered into this 1st day of January, 1913, by and between Brittains Limited of Cheddleton, Staffordshire, England party of the first part James R. Crompton & Brothers Limited of Bury, Lancashire,

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England party of the second part and Rose & Frank Company of New York, United States of America party of the third part.

1. The parties of the first and second parts do hereby constitute the party of the third part their sole and exclusive agent, except as hereinafter otherwise provided, for the sale in the United States of America and the Dominion of Canada of all papers for carbonizing purposes manufactured by the parties of the first and second parts or either of them during the term of this agreement of the qualities hitherto supplied by them or either of them directly or indirectly to the party of the third part upon the terms and conditions hereinafter specified.

2. The parties of the first and second parts agree to deliver to the party of the third part in the City of New York or elsewhere in the United States of America or in the Dominion of Canada as may be designated by the party of the third part such quantities of paper for carbonizing purposes as may be ordered of them or either of them by the party of the third part for the use of the party of the third part or for further sale by it in the said countries upon prices to be agreed upon between the parties from time to time during the term of this contract, but not oftener than twice in each year, subject to all usual discounts; it being the intention of the parties that the prices to be agreed upon shall be the lowest prevailing market prices and shall depend on the prices of raw material and labor (sic) for the time being and that such prices shall not be changed by the parties of the first and second parts excepting after six months' notice in writing to the party of the third part of their intention to make any changes therein.

3. The parties of the first and second parts agree not to sell or deliver to any person or persons whomsoever wheresoever situate except to the party of the third part or upon the order of the party of the third part any blue carbonizing paper nor any paper known as No. 2 Carbonizing Paper of the party of the second part in any weight or quality, and to manufacture exclusively for the party of the third part papers heretofore marketed by the party of the third part by the designation 'R. & F.' and 'Sheepskin' or any other similar carbonizing paper manufactured according to the same formula as the said last specified paper under any other name whatsoever.

4. The parties of the first and second parts agree that they will not manufacture sell or deliver for or to any person or persons wheresoever situate directly or indirectly excepting to the party of the third part any paper or papers not heretofore manufactured or sold by the parties of the first and second parts or either of them the manufacture of which may be suggested to them or either of them by the party of the third part.

5. Anything contained in paragraph 1 of this agreement to the contrary notwithstanding the parties of the first and second parts may continue to sell and deliver to F. S. Webster Company of Boston, Massachusetts, and to persons in the Dominion of Canada who prior to the execution and delivery of this agreement have been customers of the parties of the first and second parts or either of them such papers as they have been supplying to the said purchasers.

6. The party of the third part agrees during the term of this agreement to purchase of the parties of the first and second parts annually such quantities as will at least equal its average annual purchases of them during the calendar years 1910, 1911 and 1912; it being understood and agreed that the continuance of the sole agency heretofore created is conditioned upon such purchases.

7. The parties of the first and second parts agree promptly to make all deliveries as and when required by the party of the third part, excepting and subject only to the act of God or unavoidable strikes and lock outs.

8. This agreement shall continue in force for the period of three years from the date hereof and shall thereafter be deemed to be extended and continued for a further period of three years unless before the expiration of the first period of three years notice shall have been given in writing by any of the parties to the others of a desire to terminate the same upon such expiration.

9. The parties of the first and second parts agree that they will promptly turn over and refer to the party of the third part all enquiries which they or either of them may receive with reference to the use, sale and importation into the territory covered by this agreement of the merchandise hereinbefore specified, and that they will not during the term of this agreement quote prices or offer the same for sale in the said territory excepting by and with the consent in writing of the party of the third part.

W. H. G.

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April 13.

Shops—Sunday Trading—Shop open on Sunday after 8 *p.m.—"Every day other than Saturday"—"Weekdays other than Saturdays"—Sunday Observance Act,* 1677 (29 *Car.* 2, *c.* 7)—*Shops Acts,* 1912 *to* 1921—*Shops (Early Closing) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 58), *Schedule, Part I., Art.* 1—*Shops (Early Closing) Act* (1920) *Amendment Act,* 1921 (11 *&* 12 *Geo.* 5, *c.* 60), *s.* 1.

By the Shops (Early Closing) Act, 1920, Schedule, Part I., Art. 1 (*a*): "Every shop shall be closed for the serving of customers not later than 8 o'clock in the evening of every day other than Saturday and not later than 9 o'clock in the evening on Saturday." The Shops (Early Closing) Act (1920) Amendment Act, 1921, provides that the above Order shall not prevent "the sale of fruit, table waters, sweets, chocolates, or other sugar confectionery, or ice-cream until 9.30 P.M. on weekdays other than Saturdays, and 10 P.M. on Saturdays." Upon an information against the occupier of a confectionery shop for keeping his shop open between 8 and 9.30 P.M. on Sunday evening:—

Held, that the words "every day other than Saturday" in Part I. of the Schedule to the Act of 1920 included Sundays, while the words "weekdays other than Saturdays" in the amending Act of 1921 did not include Sundays, and therefore that an offence had been committed contrary to the above provision of the Act of 1920.

CASE stated by Metropolitan Police Magistrate.

An information laid on behalf of the appellants charged the respondent that his shop, known as No. 10A, Marble Arch, in the County of London, was not closed for the service of customers after the hour of 8 P.M. on Sunday,

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April 30, 1922, contrary to Art. 1 (*a*) of the Order in Part I. of the Schedule to the Shops (Early Closing) Act, 1920, as amended by the Shops (Early Closing) Act (1920) Amendment Act, 1921, whereby the respondent, as occupier of the shop, became guilty of an offence against the Shops Act, 1912, and liable to a fine under that Act.

Art. 1 (*a*) of Part I. of the Schedule to the Shops (Early Closing) Act, 1920, provides: "Every shop shall be closed for the serving of customers not later than 8 o'clock in the evening on every day other than Saturday and not later than 9 o'clock in the evening on Saturday, and in the case of a contravention of this provision the occupier of the shop shall be liable to a penalty." The Shops (Early Closing) Act (1920) Amendment Act, 1921, s. 1, provides that the above-mentioned Order shall not prevent "The sale of fruit, table waters, sweets, chocolates, or other sugar confectionery, or ice-cream until 9.30 P.M. on weekdays other than Saturdays, and 10 P.M. on Saturdays." The respondent, who was the occupier of the shop in question, carried on a retail trade in confectionery, sweets, and light refreshments. It was proved at the hearing before the magistrate that the shop was open for the serving of customers with sweets after 8 P.M. but not after 9.30 P.M. on Sunday, April 30, 1922. The appellants contended that the words "every day other than Saturday" in Art. 1 (*a*) of Part I. of the Schedule to the Shops (Early Closing) Act, 1920, included Sunday, and that the words "weekdays other than Saturdays" in s. 1 of the Shops (Early Closing) Act (1920) Amendment Act, 1921, excluded Sunday, so that Sundays were not affected by the Act of 1921, and that the hours for Sunday closing were governed by the Act of 1920. The respondent contended that the Acts of 1920 and 1921 did not apply to Sundays, and that the closing of shops on Sundays was governed solely by the Sunday Observance Act, 1677.

The magistrate was of opinion (1.) that the Acts of 1920 and 1921 did not apply to Sundays, because otherwise the Sunday Observance Act, 1677, would be by implication repealed; and (2.) alternatively, that if they did so apply

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the words " weekdays other than Saturdays " in the Act of 1921 meant every day of the week including Sundays, and that therefore the sweets could be sold up to 9.30 P.M. on Sundays. He so held on the ground that the purpose of the Shops (Early Closing) Act (1920) Amendment Act, 1921, was to extend the facilities of the public to purchase sweets and certain other articles at a later hour than 8 P.M., and that if the Shops (Early Closing) Act, 1920, included Sunday in its scope then the amending Act of 1921 did so also, otherwise Sunday should have been expressly mentioned as being excluded from the amended provision as to closing hours. He therefore dismissed the information, but stated a case for the opinion of the Court, the question of law being whether upon the facts above stated he was right in his decision.

H. D. Roome for the appellants. The respondent contravened the Shops Act, 1912, and the magistrate ought to have convicted him. Sunday is a " day of the week " within the Schedule to the Shops (Early Closing) Act, 1920, a " week " being defined by the Shops Act, 1912, s. 19, as " the period between midnight on Saturday night and midnight on the succeeding Saturday night." It is not a " weekday " within the meaning of the Shops (Early Closing) Act (1920) Amendment Act, 1921. The alteration from " day of the week " in the Act of 1920 to " weekday " in the Act of 1921 is intentional, and the difference is substantial and clear. As regards the effect of the Shops Acts 1912–1920 upon the Sunday Observance Act, 1677, those Acts do not permit the opening of shops on Sunday. The acts which are forbidden in the two groups of statutes are distinct, and a shopkeeper who keeps open his shop after closing hours on Sunday commits in law a double offence, (*a*) by opening his shop at all; (*b*) by keeping it open after closing hours.

J. B. Matthews K.C. and *Quass* for the respondent. The Shops Act, 1912, deals with the hours of employment of shop assistants and provides for a weekly half holiday. It is not concerned with Sunday trading, and s. 19 of the Act only defines a week so as to include Sunday for the purpose of

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reckoning the number of the hours of employment for shop assistants in each week. Neither in that Act nor in the previous legislation leading up to it was any reference made to the opening of shops on Sunday except indirectly for the purpose already mentioned. The question of Sunday trading was purposely not touched, as being covered by the Sunday Observance Act, 1677. The same intention prevailed in the Shops (Early Closing) Act, 1920, and the same construction should be given to the words "days of the week" in that Act: the amending Act of 1921 is in pari materia. As regards the latter Act, if Sunday is held to be included as a "day other than Saturday" in the Schedule to the Act of 1920, it must be similarly included as a "weekday other than Saturday" in the amending Act of 1921.

If the construction contended for by the appellants should prevail, the effect would be to repeal the Sunday Observance Act, 1677. That Act must be repealed before the Shops Acts can operate upon Sunday trading. It is, however, neither expressly nor by implication so repealed. To quote the words of A. L. Smith L.J. in *Kutner* v. *Phillips* (1): "A repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together." Finally the maxim "Generalia specialibus non derogant" applies, and the general words of the Shops Acts cannot be held to take away from the particular provisions as to Sunday trading laid down in the Sunday Observance Act, 1677.

[Reference was made to Maxwell on the Interpretation of Statutes (9th ed., chap. VII., s. iii.); to Lord Selborne's judgment in *Seward* v. *Owner of Vera Cruz* (2); to *Thorpe* v. *Adams* (3); and to *Blackpool Corporation* v. *Starr Estates Co.* (4)]

It follows that the Sunday Observance Act, 1677, and its amending statutes are still the only statutes to be considered where the opening of shops on Sunday is concerned, and that the magistrate's decision was right.

(1) [1891] 2 Q. B. 267, 271.
(2) (1884) 10 App. Cas. 59, 68.
(3) (1871) L. R. 6 C. P. 125.
(4) [1922] 1 A. C. 27.

LORD HEWART C.J. referred to the above facts as set out in the case stated and to the material sections of the Shops Acts, and continued: This is a case stated, and the question arises under the comparatively recent legislation upon the early closing of shops. On August 14 and 25 the respondent appeared before one of the Metropolitan Police Magistrates to answer an information laid on behalf of the appellants charging that upon Sunday, April 30, 1922, a shop known as No. 10A, Marble Arch, in London, was not closed for the serving of customers at and after the hour of 8 in the evening in contravention of Art. 1 (*a*) of the Order set out in Part I. of the Schedule of the Shops (Early Closing) Act, 1920, as amended by the Shops (Early Closing) Act (1920) Amendment Act, 1921, whereby the respondent being the occupier of that shop became guilty of an offence against the Shops Act, 1912. The learned magistrate dismissed the information, and the question for this Court to determine is whether he was right in point of law.

By Art. 1 (*a*) of Part I. of the Schedule to the Shops (Early Closing) Act, 1920, it is provided that every shop shall be closed for the serving of customers not later than 8 o'clock in the evening on every day other than Saturday and not later than 9 o'clock in the evening on Saturday; and in the case of a contravention of that provision the occupier of the shop is to be liable to a penalty. By s. 1 of the Shops (Early Closing) Act (1920) Amendment Act, 1921, that Order is not to prevent the selling of fruit, table waters, sweets, chocolates or other sugar confectionery or ice cream until 9.30 P.M. on weekdays other than Saturdays and 10 P.M. on Saturdays; and it was proved at the hearing that the respondent was the occupier of the shop, that he there carried on a retail trade in confectionery, sweets and light refreshments, and that the shop was open for the serving of customers with sweets after 8 o'clock in the evening, but not after half-past 9 in the evening of Sunday, April 30, 1922.

In that state of the facts and of the law there were really two questions to consider, and they are shortly stated in the opening words of the judgment delivered by the learned

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magistrate and annexed to the special case. "There are," he says, "two points. The contention in this case is that in the first Schedule to the Shops (Early Closing) Act, 1920, the expression 'every day other than Saturday' also includes Sunday; and further that in the Amending Act, para. 4 of s. 2, the expression 'weekday other than Saturday' intentionally excludes Sunday." Now looking at that legislation and looking at the context of those words, I have no doubt, speaking for myself, that each of those contentions was correct. It is, of course, obvious—too obvious to need explanation or development—that it is one thing to say that Sunday is a day of the week, and another thing to say that Sunday is a weekday, especially when you are dealing with legislation which in more than one place points a clear contrast between Sundays on the one hand and weekdays on the other hand. I refer only to three matters: in the Act of 1912, s. 19, "week" is defined; it is the period between midnight on Saturday night and midnight on the succeeding Saturday night. In the Shops Act of 1913, s. 1, sub-s. 1 (*b*), it is provided as follows: "Provision shall be made for securing to every such assistant (i) thirty-two whole holidays on a weekday in every year, of which at least two shall be given within the currency of each month and which shall comprise a holiday on full pay of not less than six consecutive days," and (ii) twenty-six whole holidays on Sunday in every year, so distributed that at least one out of every three consecutive Sundays shall be a whole holiday"; and again, if one turns to the Amending Act of 1921 one there finds the expression "The sale of fruit, table waters, sweets, chocolates or other sugar confectionery or ice cream until 9.30 P.M. on weekdays other than Saturdays." I cannot doubt that "every day other than Saturday" includes Sunday, and that "weekdays other than Saturday" excludes Sunday; and no dissertation, however edifying, on the statutory piety of the later seventeenth century, and no analysis, however exhaustive, of the enactments of the last thirty years seems to me to affect, or even to obscure, that simple point.

It was said by the learned magistrate, and it has been repeated in argument to-day, that to hold what I am now holding involves this: that the Lord's Day Observance Act, 1677, must be taken to have been pro tanto impliedly repealed by this later legislation. I do not think any such conclusion follows. On the contrary the later legislation is cumulative upon the Lord's Day Observance Act, 1677. But even if it were granted that that earlier Act is in abeyance, whatever the fact may be—and it may well be that the practice in different parts of the country is different—that Act remains, and superadded to it, as something cognate to and not repugnant to its provisions, there comes the later legislation upon hours of closing. In these circumstances I think that the learned magistrate was wrong, and that this case ought to be remitted to him with directions to convict.

AVORY J. I am of the same opinion. The short point in this case is whether the words in Art. 1 (*a*) of the Schedule to the Shops (Early Closing) Act, 1920, "every day other than Saturday" includes Sunday; the meaning of these words appears to be plain, and Art. 1 (*b*) of the Schedule makes it even more plain when it goes on to provide that any person who carries on in any place, not being a shop, any retail trade or business after 8 o'clock in the evening on any day other than Saturday shall be liable to a penalty. I cannot doubt that Sunday is a day other than Saturday in the week. The only further difficulty which was presented in this case is whether the words "weekdays" in the Act of 1921 include Sunday. It is clear, looking at these several Shops Acts, that the expression "weekdays" is distinguished throughout from the expression "days of the week," and that the expression "weekdays" means "the days of the week other than Sunday," whereas Sunday is undoubtedly a "day of the week."

With regard to the point that the effect of so construing this statute is to repeal the Sunday Observance Act, 1677, it clearly will not help the respondent here to say that the

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Avory J.

Sunday Observance Act has been repealed while the Shops Act remains in force. In my view this does not operate as a repeal of the Sunday Observance Act, especially in view of the fact that the Legislature has recognized by the Sunday Observance Prosecution Act, 1871, that prosecutions under the original Act are seldom undertaken, and now they can only be undertaken on the express consent of the chief officer of police or of a magistrate. Having recognized that such prosecutions are seldom undertaken, there is no inconsistency in saying that, while although a man may be liable if he opens his shop at all on Sunday, he shall be liable to a particular penalty if he keeps it open after a certain hour in the evening of Sunday.

ROCHE J. I concur in the decision of the Lord Chief Justice and of Avory J. and with their reasons. With regard to the reasons given by the learned magistrate for his decision, those seem to me to be matters rather for the Legislature than for the Court.

Appeal allowed.

Solicitor for appellant: *D. P. Andrews.*
Solicitor for respondent: *S. Landman.*

F. P F.

CALDWELL, APPELLANT *v.* JONES AND OTHERS, RESPONDENTS.

1923
May 9.

Licensing Acts—Intoxicating Liquor "consumed" on licensed Premises during prohibited Hours—Intoxicating Liquor brought into Premises by Person consuming it—Licensing Act, 1921 (11 & 12 *Geo.* 5, *c.* 42), *s.* 4.

Sect. 4 of the Licensing Act, 1921, provides (inter alia) that no person shall, except during the permitted hours, "consume" in licensed premises any intoxicating liquor:—

Held, that the word "consume" must be read in its natural and ordinary sense, and therefore that the section prohibits, except during the permitted hours, and subject to the specific exceptions provided for by the Act, the consumption on licensed premises of any intoxicating liquor, even though that liquor may not have been sold or supplied on those premises, but has been brought into the premises by the person consuming it there.

CASE stated by the Liverpool stipendiary magistrate.

Informations were preferred by the appellant against the three respondents under the Licensing Act, 1921, for having on December 9, 1922 (not being during permitted hours within the Act), consumed intoxicating liquor in certain licensed premises in Liverpool.

The following facts were proved or admitted: At 5.3 P.M. on Saturday, December 9, 1922, two police officers visited the licensed premises, 6 Moor Street, Liverpool, and found the three respondents in a small parlour at the rear of the bar with three glasses of whiskey and soda. The whiskey which they were consuming had not been at any time sold or supplied by the licensee or the barmaid of the premises, but had been taken there in a bottle by the respondent Jones when he entered the premises, he having the whiskey in his possession because it had been his intention to attend a football match in the neighbourhood during the afternoon, an intention, however, which he did not carry into effect. The respondents, before the entry of the police, ordered soda-water from the barmaid, and the respondent Jones added thereto, in the absence and without the knowledge of the barmaid (the licensee not being on the premises at all),

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the whiskey which he had brought on the premises, and it was this whiskey which the three respondents were consuming when the police officers entered. The time at which the consumption was taking place—namely, 5.3 P.M.—was not a "permitted" hour within the meaning of the Licensing Act, 1921.

It was contended for the appellant that the effect of s. 4 of the Licensing Act, 1921 (1), was to prohibit absolutely the consumption on licensed premises of any intoxicating liquor during prohibited hours except in conformity with the exceptions provided for in s. 5 of the Act (2); and that the fact that the intoxicating liquor was brought on to the premises by the person consuming it and was not sold or supplied to him on those premises by the licensee thereof did not affect his liability under s. 4.

It was contended for the respondents that the facts did not disclose an offence under s. 4, as the intoxicating liquor which the respondents were consuming had not been sold or supplied to them by the licensee of the premises upon which the consumption was taking place; and that the word "consume"

(1) Licensing Act, 1921, s. 4: "Subject to the provisions of this Part of this Act, no person shall, except during the permitted hours—

"(*a*) either by himself, or by any servant or agent, sell or supply to any person in any licensed premises or club any intoxicating liquor to be consumed either on or off the premises; or

"(*b*) consume in or take from any such premises or club any intoxicating liquor."

(2) Sect. 5: "Nothing in the foregoing provisions of this Part of this Act shall be deemed to prohibit or restrict—

"(*a*) the sale or supply to, or consumption by, any person of intoxicating liquor in any licensed premises or club where he is residing; or

. . . . . .

"(*c*) the supply of intoxicating liquor for consumption on licensed premises to any private friends of the holder of the licence bona fide entertained by him at his own expense, or the consumption of intoxicating liquor by persons so supplied; or

"(*d*) the consumption of intoxicating liquor with a meal by any person in any licensed premises or club at any time within half an hour after the conclusion of the permitted hours, provided that the liquor was supplied during permitted hours and served at the same time as the meal and for consumption at the meal. . . . ."

in s. 4 referred to consumption only after sale or supply by the licensee of those premises.

The stipendiary magistrate dismissed the information, being of opinion (1.) that the word "consumption" throughout the Licensing Acts up to the time of the passing of the Act of 1921, was used only in connection with the sale or supply of intoxicating liquor by the licensee; (2.) that the policy of the law up to the time of the passing of the Act of 1921 (omitting the temporary wartime restrictions) was that there was no offence under the Licensing Acts by any consumption on licensed premises of intoxicating liquor which had not in fact been sold or supplied by the licensee; and, consequently, that the word "consume" in s. 4 of the Act of 1921 must be construed as referring only to or dealing with the consumption of intoxicating liquor on licensed premises which had been previously sold or supplied by the licensee of those premises.

The question for the opinion of the Court was whether the stipendiary magistrate's decision was right.

Hanbury Aggs for the appellant. The stipendiary magistrate put too restricted a meaning on the word "consume" in s. 4 of the Licensing Act, 1921. The word should receive its ordinary, natural meaning. The prohibition of the consumption of intoxicating liquor on licensed premises, except during the permitted hours, is absolute, and is quite distinct from the sale or supply of intoxicating liquor. The cases cited to and relied on by the stipendiary magistrate—*Blakey* v. *Harrison* (1); *Thompson* v. *Davison* (2); and *M'Elfrish* v. *Barlow* (3)—turned on the language of orders or regulations made during the wartime restrictions which was different from that in s. 4. In *Blakey* v. *Harrison* (1) the Court felt compelled to give a restricted meaning to the word "consumption" to avoid the absurdity of the position of a landlord of licensed premises not being allowed to drink a glass of his own beer during prohibited hours in his own

(1) [1915] 3 K. B. 258. (2) [1916] 1 K. B. 917.
(3) 1917 S. C. (J.) 32.

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premises. That difficulty has been got over by the exceptions contained in s. 5 of the Act of 1921.

The respondents were not represented.

LORD HEWART C.J. having stated the facts and contentions, continued: The stipendiary magistrate decided that the word "consume" in s. 4 had the more limited meaning contended for by the respondents, and the question is whether he was right in so deciding. During the argument our attention was directed to *Blakey* v. *Harrison* (1); *Thompson* v. *Davison* (2) and *M'Elfrish* v. *Barlow* (3); but as those cases turned on the particular words of individual orders or regulations they do not throw much light upon the question we have to determine. Speaking for myself, I think that the word "consume" in s. 4 is to be construed in its natural and ordinary sense, and that there is no reason why a different meaning should be sought for it unless the literal construction of the word would involve a result so unreasonable that the Legislature cannot have contemplated it; in other words, it is not necessary to torture the expression into meaning something artificial if its natural meaning is not repugnant to reason. Looking at the statute as a whole and the apparent object of the Legislature in securing that there should be an interval during the afternoon when intoxicating liquor is not to be sold or supplied, I can see nothing repugnant to that object in a provision which would prevent, for example, persons purchasing intoxicating liquor in one licensed house, shortly before the termination of the permitted hours, and proceeding to adjoining licensed premises and claiming to be entitled to consume the liquor there on the ground that it had not been sold or supplied in those premises. The word "consume" means what it says; and the fact that the intoxicating liquor being consumed on the licensed premises was not sold or supplied there is an irrelevant circumstance. An ingenious argument might be framed on the words following "consume" in s. 4 (*b*), namely, "take from any

(1) [1915] 3 K. B. 258. (2) [1916] 1 K. B. 917.
(3) 1917 S. C. (J.) 32.

such premises or club any intoxicating liquor," in relation to intoxicating liquor which a person takes into licensed premises and takes out again, but the argument would probably be more ingenious than convincing, and its merits would depend upon giving too limited a meaning to the expression "take from." In this case I think the stipendiary magistrate's decision was erroneous, and the case must go back to be dealt with according to law.

ROCHE J. I agree with my Lord on the broad ground upon which he has put his judgment, but I desire to add, speaking for myself, that even if the test adopted by the stipendiary magistrate were correct—and in my opinion it was not—there nevertheless ought to have been a conviction, for the liquor consumed by the respondents was a mixture of whiskey and soda-water, and the soda-water, which was a material constituent in the mixture to make it more palatable, was not only consumed but supplied on these licensed premises.

BRANSON J. I agree. I see no reason for construing the word "consume" otherwise than in its ordinary sense. In *Blakey* v. *Harrison* (1) the Court felt compelled to assent to the argument that the word should receive a more limited meaning because of the difficulty that would otherwise arise in preventing the landlord of licensed premises drinking a glass of his own beer during prohibited hours. Under this statute the Court is not constrained to take that limited view inasmuch as one of the exceptions in s. 5 meets the difficulty. Therefore the only reason why the Court in *Blakey* v. *Harrison* (1) came to the conclusion it did has been removed.

Appeal allowed.

Solicitors for appellant: *F. Venn & Co., for Walter Moon, Liverpool.*

(1) [1915] 3 K. B. 258.

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Feb. 28;
March 14,
15, 26.

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[1921. H. 5111.]

Deed—Exchange of Parsonage House—Validity—Need for statutory Sanction—No Evidence of Statute—Presumption.

A deed made in 1785, by which the rector of a parish purported to grant and transfer to the lord of the manor the parsonage house in exchange for another house granted to him by the latter, would not have been valid unless it had been authorized by statute. There was no evidence that the deed had been so authorized, but it was shown to have been properly made in all other respects:—

Held, that the Court was justified in presuming that the deed had received statutory sanction and was in all respects valid.

Statute—Private Act—Construction—Taxes and Rates on Parsonage House and Glebe—Charge upon adjoining Land—Exchange of original Parsonage House for another House—Liability of adjoining Land in respect of new Parsonage House—Lease of Glebe—Liability of adjoining Land in respect of Glebe—Delay in enforcing Charge—Limitation of Action—"Composition"—"Rent"—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *ss.* 1, 29.

A private Act passed in 1749 provided that all the lands and tenements in a parish, except such part as belonged to the rectory, should be subject to a charge of all such Parliamentary and parochial taxes, rates, and assessments as should from time to time be assessed upon the parsonage house and glebe, or upon the rector and his successors in respect of the same. By deeds of subsequent date the original parsonage house and glebe were exchanged for another house and ground in the parish which were thereafter used as the parsonage house and glebe. The then rector let the new glebe to a tenant who paid the taxes and rates thereon. In 1921, no action or other proceeding to enforce the said charge having then been brought within sixty years, the then rector brought an action against the owner of certain of the said lands and tenements for a declaration that the defendant's lands and tenements were charged with a sum which had been paid by the rector in respect of these taxes and rates and for a declaration that he was entitled to enforce the charge by distress or otherwise:—

Held, that, on the true construction of the private Act, the benefit to the rector for the time being of the charge thereby imposed upon the said lands and tenements was not limited to the original parsonage house and glebe, but extended to the new parsonage house and glebe.

In re Smith [1904] 1 Ch. 139 held applicable.

Held, also, that the benefit to the rector of the said charge applied in respect of the glebe notwithstanding that he had let it to a tenant who paid the taxes and rates thereon.

Held, further, that the said charge was a "composition" and

therefore was not a "rent" within the meaning of the Real Property Limitation Act, 1833, s. 1, and, consequently, that the right of the rector to bring the action was not barred by s. 29 of that Act.

Rating—Assessment—Parsonage House and Glebe—Rateability of Parson as Individual.—Poor Relief Act, 1601 (43 *Eliz. c.* 2).

Semble, that a parson is rated in respect of the parsonage house and glebe not as the occupier of the particular premises, but rather as an individual expressly named in the Poor Relief Act, 1601.

North Manchester Overseers v. *Winstanley* [1908] 1 K. B. 835, 838; S. C. nom. *Winstanley* v. *North Manchester Overseers* [1910] A. C. 7 applied.

Revenue—Inhabited House Duty—Nature of—New Duty distinct from Window Tax—House Tax Act, 1851 (14 & 15 *Vict. c.* 36), *ss.* 1, 4.

The inhabited house duty created by the House Tax Act, 1851, s. 1, is not a continuation under another name of the window tax, which was repealed by s. 4 of that Act, but is a new duty of a different character; and therefore a provision in a private Act passed before 1851, that certain land should be charged with all such Parliamentary taxes and assessments as should from time to time be taxed, charged, or assessed upon the parsonage house and glebe of a parish or the rector in respect thereof "except . . . . the window tax" charges the land with payment of the inhabited house duty assessed upon the parsonage house and glebe after that date.

Associated Newspapers, Ld. v. *City of London Corporation* [1916] 2 A. C. 429 and *Pole-Carew* v. *Craddock* [1920] 3 K. B. 109 applied.

Revenue—Income Tax—Deduction—Annual Sum or Rentcharge—Composition—Private Act providing for Payment without Deduction of Tax—Right to deduct Tax—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 170, *sub-s.* 2, *s.* 213; *First Schedule, Sch. A, No. II., r.* 3; *No. VII., rr.* 6, 7; *No. VIII., rr.* 3, 4; *All Schedules Rules, rr.* 19, 21, 23.

A private Act passed in 1749 provided that a specified annual sum or yearly rentcharge to be issuing out of land in a parish should be paid to the rector and his successors for ever free from all deduction for or in respect of any taxes rates or assessments imposed upon the land out of which the annuity or rentcharge was to issue by any present or subsequent Act. The owner of the land having paid the income tax on the said annual sum under the Income Tax Act, 1918:—

Held, that he was not entitled in paying the annual sum to the rector to deduct the income tax paid by him thereon either under s. 213 of that Act, or under the general provisions thereof.

ACTION tried by McCardie J. without a jury.

The plaintiff, the Rev. Edward James Harper, was the rector of the parish of Broughton in Bucks. The defendant, Mr. Robert Hedges, was a landowner in the parish. In

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1921 the plaintiff brought this action against the defendant, his claim being in substance for a declaration that a sum paid by him in respect of rates and taxes on the parsonage house and glebe was a charge upon the land owned by the defendant in the parish; a declaration that the plaintiff was entitled to enforce that charge by distress; and a declaration that a certain annual sum should be paid by the defendant to the plaintiff free of income tax.

The facts are set out below in the judgment of the learned judge.

The case was tried on February 28 and March 14, 15 and 26, 1923. On behalf of the plaintiff evidence was given by the plaintiff himself and by Mr. H. S. Osborne, managing clerk to the solicitors for the tenant for life of the Broughton estate; and on behalf of the defendant by the defendant himself.

G. M. Edwardes Jones for the plaintiff.

Disturnal K.C. and *J. F. Eales* for the defendant.

The arguments of counsel and the principal statutes, cases and text-books referred to fully appear from the judgment. The following additional statutes and cases were also cited: As to the alienation of church property: 1 Eliz. c. 19, s. 4; 13 Eliz. c. 20; 1 Geo. 1, stat. 2, c. 10, s. 13; the Clergy Residences Repair Act, 1777 (17 Geo. 3, c. 53); 43 Geo. 3, c. 107, s. 2; the Glebe Exchange Act, 1815 (55 Geo. 3, c. 147); the Tithe Act, 1842 (5 & 6 Vict. c. 54), s. 5; and *Rex* v. *Buckinghamshire Justices* (1); as to tithes: the Tithe Act, 1832 (2 & 3 Will. 4, c. 100); and *Salkeld* v. *Johnston* (2); as to limitation of action: the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57); *Payne* v. *Esdaile* (3); and *Bradford Old Bank* v. *Sutcliffe* (4); as to income tax: *Duke of Argyll* v. *Inland Revenue Commissioners* (5); and as to the form of the action: *Thomas* v. *Sylvester*. (6)

(1) (1823) 1 B. & C. 485; 2 D. & R. 689.

(2) (1848–9) 1 Mac. & G. 242; 1 H. & Tw. 329; 18 L. J. (Ch.) 493; S. C. in Ex. (1848) 18 L. J. (Ex.) 89.

(3) (1888) 13 App. Cas. 613, 626.

(4) [1918] 2 K. B. 833.

(5) (1913) 109 L. T. 893; 30 Times L. R. 48.

(6) (1873) L. R. 8 Q. B. 368.

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March 26. McCARDIE J. This action was ably argued before me for several days. Many points of ecclesiastical and conveyancing law have been discussed. More than one question of income tax law is raised. To deal at length with the various arguments and the matters of debate would need a treatise. It is essential to summarize some of the points at issue in this difficult and unusual case.

The plaintiff is the rector of Broughton in the county of Bucks. The living is a small one. The total gross annual value is only 177*l.* The defendant is the owner of about 300 acres of land in the same parish. The substantial heads of the plaintiff's claim are three—namely: (1.) a declaration that the defendant's lands are charged with 124*l.* 1*s.* 10*d.* in respect of rates and assessments paid by the plaintiff from time to time during the period from 1910 onwards; (2.) a declaration that the plaintiff is entitled to enforce such charge by distress or otherwise; (3.) a declaration that certain annual payments (liability for which is not disputed by the defendant) must be made by the defendant to the plaintiff free of income tax.

These apparently simple issues raise not only the ecclesiastical, conveyancing and income tax points indicated, but also raise a wholly new point upon the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27).

The following are the circumstances. In 1749 a private Act of Parliament was passed. It is 22 Geo. 2, No. 26, c. 9. It recites that Barnaby Backwell was seised in fee simple of the manor or lordship of Broughton in the county of Bucks and of the perpetual advowson of the rectory of Broughton, and of the fee simple of all lands, tenements and hereditaments in the said parish except such part as belonged to the rectory. It next recites that Philip Barton as rector is seised of a messuage called the parsonage house, with outhouses, etc., containing about one and a half acres, and is also seised of two parcels of glebe lands amounting to about eleven acres. It then recites that a prior lord of the manor (F. Duncombe) and a prior rector (H. Voyce, clerk) had agreed that "the said F. Duncombe, his heirs and assigns should pay to the

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said H. Voyce and his successors, rectors of the said parish, the yearly sum of 77*l.*, free from all taxes and deductions, in lieu of all manner of tithes arising, renewing, or increasing from the said manor and premises, and should discharge the said parsonage-house and glebe-lands from all manner of taxes whatsoever, as well Parliamentary as parochial (except the window tax)." It then recites the beneficial nature of that agreement and that it could not be effected without the aid of an Act of Parliament. The Act then provides in substance as follows: (*a*) that the said agreement is ratified, established and confirmed; (*b*) that one annual sum or yearly rentcharge of 77*l.* "to be issuing and going out of all that the manor or lordship of Broughton, in the parish of Broughton . . . . and out of all and every the messuages, farms, lands, tenements and hereditaments of him the said B. Backwell, situate, lying, and being within the said parish . . . . shall be payable and paid to the said Philip Barton and his successors, rectors of the said parish Church of Broughton aforesaid for ever free from all deductions for or in respect of any taxes, charges, or assessments, taxed or imposed, or to be charged or assessed upon the said premises, or any part thereof, out of which the said annuity or yearly rentcharge is to issue, by any present or subsequent Act of Parliament, or for or in respect of any other cause, matter, or thing whatsoever." The Act then provides that the said 77*l.* shall be paid in equal portions on the Feasts of the Annunciation of the Virgin Mary, St. John the Baptist, St. Michael the Archangel, and at Christmas. It then provides if the said payments be not made a power of distraint can be exercised by the rector for the time being. The next provision of the Act (and a vital one) is this: "And it is hereby further enacted by the authority aforesaid that the said lands, tenements, and hereditaments hereby charged with and made liable to the payment of the said perpetual annuity or yearly rentcharge of 77*l.*, shall, after the 25th March, 1749, be also charged with, and the same are hereby from thenceforth charged with and made liable to answer and pay all such Parliamentary and parochial taxes, rates, and assessments, as

shall from time to time be taxed, charged, or assessed upon the said parsonage-house, outhouses, yard, garden, orchard, and glebe lands, hereinbefore-mentioned and described, or any part or parts thereof, or upon the said Philip Barton and his successors, rectors of Broughton aforesaid, in respect of the same, other than and except the tax or assessment upon houses, windows, or lights, commonly called the window tax." The Act further provides in substance that the lands of the lord of the manor shall (subject to the 77*l.* and the said provision as to payment of rates, etc., on the parsonage house) be thenceforth wholly discharged from payment of great and small tithes. Such is the Act.

The next thing to be named is this. In 1785 a deed of exchange was executed. The parties were (1.) the Lord Bishop of Lincoln, (2.) the Rev. Philip Barton, (3.) Miss Backwell, the lady of the said manor. To the deed a plan was annexed. The substance of the deed is that the said rector granted to the lady of the manor, her heirs and assigns: "All that the Parsonage House and yard with the garden and premises thereunto adjoining as particularly described and laid out in the plan (No. 1)." The deed then provides that the lady of the manor grants to the said Philip Barton and his successors, rectors of Broughton aforesaid: "All that the . . . . freehold messuage or tenement with the out-buildings, yard and premises with the appurtenances as particularly described and laid down in the plan (No. 2), ... to have and to hold, ... unto the said Philip Barton and his successors, rectors of Broughton aforesaid for ever in exchange for the said Parsonage House and premises conveyed to the said Sarah Backwell, her heirs and assigns by the said Philip Barton." The deed then creates (*a*) a covenant by the rector with Miss Backwell for her quiet enjoyment, and (*b*) a covenant by Miss Backwell with the rector and his successors for their quiet enjoyment. Finally, the deed provides as follows: "And the said Thomas, Lord Bishop of Lincoln having been certified under the hands of George Wrighte, Esquire, William Prayde, Esquire, and the Rev. Edmund Smythe, clerk, three of the Commissioners

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appointed by him to enquire into the propriety or impropriety of the said exchange, 'that the Rectory of Broughton and the future rectors thereof will not only receive no injury by such exchange, but that they will in every respect reap thereby a very essential accommodation and advantage,' doth by virtue of his Authority ordinary and episcopal (as far as by law he can) approve of, ratify and confirm the exchange and agreement hereby made in all things according to the true interest and meaning of these presents." The deed is duly executed by the Lord Bishop of Lincoln, and the said rector, and the said lady of the manor. The result of the deed, if valid, was that the old parsonage house, No. 1, was exchanged for a wholly new parsonage house, No. 2. So far as I can see, no question as to the validity of this deed has been raised until quite recently. It appears from the map that the new parsonage house was quite close to the old parsonage house. The latter has long since been demolished. The site of it is now part of a field or a barn. The new parsonage house of 1785 stands to-day substantially as it stood 138 years ago. The plaintiff, of course, is the successor of the rector of that period.

The rest of the main facts can be briefly told. In 1855 a certain deed was executed between the then owner of the manor and other persons whereby the lands were divided into two schedules. The deed recited the Act of 1749, and provided in substance that the yearly 77*l.* charge and the burden as to the rates, etc., of the parsonage house should fall upon lands in the second schedule in exoneration of the lands in the first schedule. The defendant's lands were in the first schedule. To this deed the then rector was not a party, and in my view the deed does not affect the rights of the present plaintiff as against the defendant. Passing over intermediate transmissions of title, the next date to be mentioned is 1895. It will have been noted that the deed of 1785 dealt only with the parsonage house, and not with the glebe. But on March 9, 1895, the glebe of the plaintiff's immediate predecessor, the Rev. Mr. Luxmore, was exchanged for other land within the parish which thenceforward took

the place of the old glebe. I need not state the details of this exchange. It was made by the Board of Agriculture with the consent of all parties concerned under the provisions (inter alia) of the Tithe Act, 1842 (5 & 6 Vict. c. 54), s. 5. I think that the new glebe took the place of the old glebe for the purposes of the Act of 1749. In 1905 the then lord of the manor sold much of his land to the parish; it was broken up into lots. The defendant bought lot 2, amounting to about 300 acres. He became the legal owner of that lot. The conditions of sale recited the Act of 1749 and the provisions of it, which have been set out in this judgment, and provided as follows: "Each purchaser shall be deemed to have full notice of the contents thereof." Condition No. 10 then provided: "As regards the said provision as to rates and taxes on the Parsonage and glebe, the liability (if any) now subsisting . . . . shall, as between the several lots, be deemed charged exclusively on Lot 2 in exoneration of all other lots affected, and no purchaser of any such other lot shall require any further exoneration therefrom. It is believed that no payment in respect of this liability of rates and taxes on the parsonage and glebe has been made for very many years, though a claim has recently been put forward in respect of it. The parsonage house now existing is, and has since 1785 stood on land which did not belong to the rectory at the date of the said Act of Parliament, and it is maintained on behalf of the vendor that the provisions of the said Act as to rates and taxes do not apply to the present parsonage house." It only remains to add that the plaintiff was duly instituted and inducted in 1910.

The plaintiff seeks in this action (after much correspondence) to enforce the provisions of the Act of 1749.

I now deal with the first point raised by the defendant, and I postpone mention of the few further facts, until I deal with the further points. The first, then, is whether or not the Act of 1749 binds the defendant so far as regards the provision in that Act for the payment of the rates, etc., on the parsonage house and glebe. It is not disputed that the defendant is liable under that Act for his proper

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proportion of the 77*l.* yearly charge it created. Put briefly, the defendant's contentions are these: (1.) that the Act of 1749 named and described a specific parsonage house only; (2.) that the specific parsonage house was demolished long ago, and that thereupon the Act of 1749 ceased to apply; (3.) that the exchange of 1785 was contrary to law and void, and that the purported substitution of a new parsonage house for the old parsonage house was destitute of validity, and does not bind the defendant.

It will be convenient to consider, in the first place, whether the exchange deed of 1785 was valid or not. If valid, then prima facie the defendant is bound by the substitution of one parsonage house for another. This question of validity raises a point which has not been considered in the Courts for many years. The deed of 1785 purported to transfer to the lord of the manor the old parsonage house on one site in exchange for a new parsonage house on another site. This, say the defendant's counsel, could not be done save by the authority of Parliament. I think that this contention is prima facie correct. It is a remarkable thing that at common law a parson, with the consent of the patron and the Ordinary, might completely alienate and grant away his parsonage house: see Phillimore's Ecclesiastical Law (1873 ed.), Part V., ch. 6, and per Lord Northington L.C. in *Attorney-General* v. *Cholmley*. (1) To prevent the further exercise of such a power the Act of 13 Eliz. c. 10 was passed, which by s. 3 precluded (inter alia) alienation of a parsonage house, save to the extent of certain limited leases. Various other statutes were referred to before me, and they will be found in Chitty's Statutes, vol. vii., tit. "Leases." I do not mention them further as it became clear during the argument that none of them touched the point here in question. If, then, the deed of 1785 was prima facie invalid, it would appear that the grant of the old parsonage house was of no avail, and that the plaintiff's title to the new parsonage house can be based only on the operation of the Statute of Limitations. But ought I to hold that the deed was void as being against

(1) (1765) 2 Eden, 304, 316, 317.

the statute of Elizabeth? The deed was made with the fullest formality. The Lord Bishop of Lincoln was a party to it, and the amplest investigations were made as to the propriety of the exchange. Both Mr. Disturnal K.C. and Mr. Eales, in their able arguments for the defendant, realized the difficulty of asserting that such a deed was to be taken as made in defiance of 13 Eliz. c. 10, although obviously executed by those who would be thoroughly familiar with the relevant law. Such a thing is admittedly highly improbable. The question does arise as to whether or not I can infer that in fact that deed of 1785 received Parliamentary sanction. It is a most unusual point, and I confess never before have I had to consider such a matter. It is well known that in the eighteenth century an infinite number of private Acts were passed, and that many of the so-called public Acts as well as the private Acts contained innumerable and detailed provisions. The Turnpike Road and the like Acts were of themselves almost innumerable. There is no actual evidence before me of any Parliamentary provision validating the 1785 deed. On the other hand, that deed has been acted on for a most prolonged period as if binding in law. If I am entitled to infer a Parliamentary sanction, I think this is a case in which I ought so to do. Upon the whole I think (though with doubt) that I am justified in making that presumption here. I find the following passage in Best on Presumptions (1844 ed.), pp. 144 and 145: "There is hardly a species of Act or document, public or private, that will not be presumed in support of possession. Even Acts of Parliament may thus be presumed, as also will grants from the Crown, letters patent, writs of ad quod damnum and inquisitions thereon, bye-laws of Corporations, fines and recoveries, the enfranchisement of copyholds, endowment of vicarages, exemption from tithes, consent of ordinary to composition deeds, etc." The principle thus stated seems to be here applicable. Many authorities support the statement of Mr. Best. In particular, I find that the decisions appear to show that an Act of Parliament may in appropriate cases be presumed. I mention a few only. Thus in *Viscountess*

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Stafford v. *Llewellin* (1), in Michaelmas term of 34 Car. 2, the Court stated that they presumed that there had been an Act of Parliament, though not now to be found. So, too, per Lord Mansfield, in *Eldridge* v. *Knott* (2), and per Littledale J. in *Lopez* v. *Andrew* (3); and see, too, *Attorney-General* v. *Ewelme Hospital.* (4) The force of those decisions is limited but not dissipated by the observations of the Court in *Reg.* v. *Chapter of Exeter.* (5) I need only refer further to Taylor on Evidence, 11th ed., para. 130, to the principle of *Philipps* v. *Halliday* (6), and to the observations of Swinfen Eady J. in *Robinson* v. *Smith.* (7)

If then I presume, as I do, Parliamentary sanction to the exchange of 1785, the first difficulty in the way of the plaintiff is removed. But even if I do not make such a presumption, I still come to the conclusion that the Act of 1749 applies to the present parsonage house. I think, upon the whole, that the fair intent of that Act was not to limit the provision as to payment of rates to a specific building, but to enact that the rates, etc., should be paid upon the parsonage house for the time being. This gives a fair and practical meaning to the Act. Unless I am right it would follow that if the old parsonage house had been accidentally burnt down in 1750, a main object of the Act of 1749 would be defeated. Surely if a new parsonage house were built in 1751 it would fall within the benefits of the Act; and so, too, if the old house had been partly burnt, or had partly fallen through dilapidation, I think that re-erection of the injured part would not affect the operation of the Act. The case of *In re Smith* (8), although on different facts, is not without some relevance.

Upon the facts here I should hold, moreover, that there was no substantial increase of burden by the substitution of the new for the old parsonage, and that further, the principle indicated by Neville J., in *Hadham Rural District Council* v. *Crallan* (9), does not apply. That learned judge

(1) (1682) Skin. 77, 78.
(2) (1774) 1 Cowp. 214, 215.
(3) (1826) 3 Man. & Ry. 329,n.
(4) (1853) 17 Beav. 366.
(5) (1840) 12 Ad. & E. 512, 532.
(6) [1891] A. C. 228.
(7) (1908) 24 Times L. R. 573.
(8) [1904] 1 Ch. 139.
(9) [1914] 2 Ch. 138.

there applied to some extent the decision in *Pringle* v. *Taylor*. (1) Moreover, in the present case I have to deal, not with a mere contractual covenant, but with the provisions of an Act of Parliament. I therefore decide that the provisions of the Act of 1749 apply to the present parsonage house.

In view of what I have said it is unnecessary to consider the most interesting question of the exchange of lands at common law, as to which see Sheppard's Touchstone (1826 ed.), ch. 16, and Holdsworth's History of English Law, 3rd ed., vol. iii., p. 233: see also the case of *Brown* v. *Patterson* (2), before Bruce J. Nor need I deal with the equitable view as to alienations made against 13 Eliz. c. 10, s. 3, as to which see *Morgan* v. *Clark* (3) and *Attorney-General* v. *Cholmley* (4) and Gibson's Codex (1761 ed.), p. 661. It is also unnecessary to discuss the doctrines as to the creation and transmission of estoppel, as to which see Phipson on Evidence, 6th ed. (1921), p. 683, and Halsbury's Laws of England, vol. xiii., p. 344, as to privies. I may add that my view as to the object and effect of the Act of 1749 is strengthened by the fact that a parson appears to be rated not as the occupier of a particular building, but rather as an individual expressly named in the Poor Relief Act, 1601 (43 Eliz. c. 2): see *North Manchester Overseers* v. *Winstanley* (5) and Ryde on Rating, 4th ed., ch. 23, pp. 538–539 and pp. 548–549.

I therefore hold that, subject to the point as to the Statute of Limitations, the plaintiff is prima facie entitled to the two first declarations he asks as against the defendant.

I have thus to consider whether the plaintiff's claim is barred by any Statute of Limitation. I point out that this is not an action of debt founded on a statute, as to which see Darby and Bosanquet on the Statutes of Limitations, 2nd ed., pp. 6 and 144. It is an action in substance to enforce by distress or equity procedure a charge on land. I next point out that until the Real Property Limitation Act, 1833,

(1) (1809) 2 Taunt. 150.
(2) (1899) Times Newspaper, Feb. 22, 1899, p. 14.
(3) (1630) 1 Rep. Ch. 22.
(4) 2 Eden, 304.
(5) [1908] 1 K. [B. 845–848, and S. C. in H. L. nom. *Winstanley* v. *North Manchester Overseers* [1910] A. C. 7.

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Stafford v. *Llewellin* (1), in Michaelmas term of 34 Car. 2, the Court stated that they presumed that there had been an Act of Parliament, though not now to be found. So, too, per Lord Mansfield, in *Eldridge* v. *Knott* (2), and per Littledale J. in *Lopez* v. *Andrew* (3); and see, too, *Attorney-General* v. *Ewelme Hospital.* (4) The force of those decisions is limited but not dissipated by the observations of the Court in *Reg.* v. *Chapter of Exeter.* (5) I need only refer further to Taylor on Evidence, 11th ed., para. 130, to the principle of *Philipps* v. *Halliday* (6), and to the observations of Swinfen Eady J. in *Robinson* v. *Smith.* (7)

If then I presume, as I do, Parliamentary sanction to the exchange of 1785, the first difficulty in the way of the plaintiff is removed. But even if I do not make such a presumption, I still come to the conclusion that the Act of 1749 applies to the present parsonage house. I think, upon the whole, that the fair intent of that Act was not to limit the provision as to payment of rates to a specific building, but to enact that the rates, etc., should be paid upon the parsonage house for the time being. This gives a fair and practical meaning to the Act. Unless I am right it would follow that if the old parsonage house had been accidentally burnt down in 1750, a main object of the Act of 1749 would be defeated. Surely if a new parsonage house were built in 1751 it would fall within the benefits of the Act; and so, too, if the old house had been partly burnt, or had partly fallen through dilapidation, I think that re-erection of the injured part would not affect the operation of the Act. The case of *In re Smith* (8), although on different facts, is not without some relevance.

Upon the facts here I should hold, moreover, that there was no substantial increase of burden by the substitution of the new for the old parsonage, and that further, the principle indicated by Neville J., in *Hadham Rural District Council* v. *Crallan* (9), does not apply. That learned judge

(1) (1682) Skin. 77, 78.
(2) (1774) 1 Cowp. 214, 215.
(3) (1826) 3 Man. & Ry. 329,n.
(4) (1853) 17 Beav. 366.
(5) (1840) 12 Ad. & E. 512, 532.
(6) [1891] A. C. 228.
(7) (1908) 24 Times L. R. 573.
(8) [1904] 1 Ch. 139.
(9) [1914] 2 Ch. 138.

there applied to some extent the decision in *Pringle* v. *Taylor*. (1) Moreover, in the present case I have to deal, not with a mere contractual covenant, but with the provisions of an Act of Parliament. I therefore decide that the provisions of the Act of 1749 apply to the present parsonage house.

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no statute had provided any limitation for claims to Church property in Church hands: see Darby and Bosanquet, 2nd ed., p. 274. Special provisions now exist with respect to the claims of spiritual and eleemosynary corporations sole to Church property: see Halsbury's Laws of England, vol. xix., p. 105. The rule in earlier days was stated by Lord Northington L.C. in *Attorney-General* v. *Cholmley* (1) as follows: "It is a fixed rule at law that the Crown and the Church cannot be prescribed against: the first, on account of its high dignity, the second, on account of its imbecility; quia fungitur vice minoris, conditionem suam meliorare potest, deteriorare nequit." I ought to add that the noble Lord Chancellor used the word "imbecility" in the sense of the Latin adjective "imbecillus"—i.e., weak or feeble.

Now before expressing any view as to the facts on the point, it seems desirable to inquire whether there is any and what statutory provision which can bar the plaintiff's claim. The defendant relies only on s. 29 of the Real Property Limitation Act, 1833. That section so far as material says: "Provided always, ... that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress or bring such action or suit shall first have accrued." The section then gives in substance the period of sixty years. The defendant here submits that the period of sixty years had expired before action brought. In answer to s. 29, the plaintiff relies on the defining words in s. 1 of the Act of 1833. They are these: "The word 'rent' shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole)." The point at issue, therefore, is

(1) 2 Eden, 304, 316.

whether the Act of 1749 created a "rent" within s. 29, in which case the sixty years would run; or whether the provision of the Act as to payment of rates, etc., on the parsonage house was a modus or composition within the commencing words of the Act of 1833. If the Act of 1749 creates a "modus" or "composition" then so far as I can see no Statute of Limitations whatsoever can bar the plaintiff's claim. Now, what is a modus or composition? This question involves a brief mention of tithes. It is a subject on which much now little known learning exists. Tithes were apparently transformed from voluntary offerings to legal obligations by Offa, King of Mercia, in the year 794: see Phillimore's Ecclesiastical Law, vol. ii., Part V., ch. 3, pp. 1483 seq. (1873 ed.), Much information on the history and law of tithes is to be found in Blackstone's Commentaries, Book II., ch. 3, and in Shelford on Tithes, published in 1839.

Now, as pointed out in Phillimore's Ecclesiastical Law, 2nd ed., p. 1160, under the old custom of tithe taking it was not uncommon for a custom to be established whereby some fixed sum of money or quantity of corn or other titheable goods were taken by the tithe owner instead of the literal tithe of the various titheable objects. This fixed sum or quantity was called a modus decimandi, or more briefly, a modus. Blackstone, in Book II., ch. 3, p. 29, puts it differently and more briefly when he says: "Any means, in short, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a modus decimandi, or special manner of tithing." Now the material distinction between a modus decimandi and a composition was thus stated by Pollock C.B. in *Salkeld* v. *Johnson*. (1) He said: "First, *modus decimandi*, which was either a custom time out of mind, within a district of paying tithes in one constant mode fixed by the custom, and depending upon some antecedent agreement made before legal memory between the parishioners and the parson, patron, and ordinary, for giving to the parson some definite profit in lieu of tithes, or by prescription in the case of individual lands, founded on

(1) 18 L. J. (Ex.) 89, 93.

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a like agreement; secondly, discharge by composition real, which scarcely differed from a modus in any other respect than by having its commencement after legal memory, and before the disabling statute, 13 Eliz., and in being founded on a deed or writing." The learned Chief Baron then points out that after 13 Eliz. c. 10, so-called compositions real were confirmed by Acts of Parliament. It appears to be Blackstone's view also that a composition effected by an Act of Parliament is yet to be deemed a composition. He uses the words: "Such compositions being now rarely heard of, unless by authority of an Act of Parliament": Book II., ch. 3, sect. 2.

Now it is clear that the Act of 1749 did not create a modus decimandi, for that Act was an eighteenth century matter, and thus not before the period of legal memory, to wit, Richard I. Did it create a "composition"? I have considered the cases of *Ekins* v. *Dormer* (1), *Attorney-General* v. *Bowles* (2) and *Simey* v. *Marshall* (3), together with other decisions and text-books. Forming the best view I can upon the whole of the authorities which bear on this novel point, I come to the conclusion that the Act of 1749 did create a composition within the fair meaning of that word as used in the Real Property Limitation Act, 1833. It therefore follows that there is no Statute of Limitations which bars the plaintiff's claim. To prevent misconception I ought to add that tithe rentcharge is a species of property distinct from a composition and is not within the exception of compositions belonging to spiritual and eleemosynary corporations sole: see Lightwood on the Time Limit on Actions (1909), p. 27. The learned author further says on the same page: "Moduses and compositions, when they consist of periodical sums charged on land, are also liable to be barred, provided they do not belong to a spiritual or eleemosynary corporation sole." In the case now before me, the plaintiff, as rector of Broughton parish, is, of course, a spiritual corporation sole.

I must add that upon the question of fact whether any

(1) (1747) 3 Atk. 533. (2) (1754) 3 Atk. 806.
(3) (1872) L. R. 8 C. P. 269.

payment in respect of rates has been made to the rector within the last sixty years, the evidence is scanty and obscure. Those who could best speak to the facts are dead. The evidence before me is in substance hearsay. If, however, I had thought that s. 27 of the Real Property Limitation Act, 1833, applied to such a subject as the present, yet I should further hold that I am not satisfied that no payment had been made within the period of sixty years before action brought.

If, as I rule, the plaintiff is entitled to each of the two first declarations he asks, there then arises a further though subordinate point. The words of the Act of 1749 are: "All such Parliamentary and parochial taxes, rates, and assessments, as shall from time to time be taxed, charged, or assessed upon the said parsonage-house, outhouses, yard, garden, orchard, and glebe-lands . . . . or upon the said Philip Barton, and his successors, rectors of Broughton aforesaid, in respect of the same, other than and except the tax or assessment upon houses, windows, or lights, commonly called the window tax." Now the Window Tax Act was abolished in 1851. That tax had produced many obvious evils in the imperfect lighting of houses. The House Tax Act, 1851, repealed 48 Geo. 3, c. 55, whereby duties were payable according to the number of windows or lights in a house, and it created what is known as the inhabited house duty. This new tax created a charge of 6*d*. for every 20*s*. of the annual value of a dwelling house, and it created a new scheme of collection by the Commissioners of Inland Revenue. The defendant submits that, if liable to the plaintiff at all, he is yet not liable for any payment made by the plaintiff in respect of inhabited house duty on the rectory house, upon the ground that this tax is the same thing in substance as the window tax.

Here again is a novel and difficult point. Upon the whole, however, I come to the conclusion that the inhabited house duty is not to be deemed a "window tax." It is a new burden of a new character with different features. The old window tax was completely abolished and a new tax was brought into being in 1851. If this be so, then the words of the Act of 1749

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are quite sufficient to place upon the defendant the burden of paying the inhabited house duty assessed on the parsonage house of the plaintiff. The principle involved in *Associated Newspapers, Ld.* v. *City of London Corporation* (1) and *Pole-Carew* v. *Craddock* (2) (in the Court of Appeal) seems to me here to apply.

There is yet a further and still more subordinate point. The plaintiff for some time past has let his glebe lands to a tenant. The tenant is the occupier, and is therefore the person actually rated, and therefore the plaintiff has not in actual cash paid the rates assessed upon that glebe. But, nevertheless, I think that the plaintiff is entitled to my decision that such rates, though paid technically by the tenant, are in substance paid by the plaintiff. To the extent that the tenant pays the rates, the rent payable to the plaintiff by the tenant is diminished.

The final point is wholly distinct from the matters I have dealt with. If it stood alone, as the only point in a case before the revenue judge, it would doubtless receive a judgment of some fullness. In view, however, of the already unavoidable length of this decision, I can only deal with it briefly. It is an income tax point, and has nothing to do with the payment of rates, etc., on the parsonage house. It relates only to the 77*l.* yearly rentcharge imposed by the Act of 1749 upon the lands of which the defendant is now owner to a substantial extent. The extent to which the defendant is owner of those lands is indicated by the fact that his annual share of the 77*l.* is 22*l.* 2*s.* 3*d.* In making that payment to the plaintiff, the defendant deducts income tax at the rate prevailing from time to time. The plaintiff has protested, and he now asserts that he is entitled to receive the amount of 22*l.* 2*s.* 3*d.* free of any deduction of income tax by the defendant. He relies on the provision of the Act of 1749, which states that the 77*l.* shall be paid to the rector and his successors " for ever free from all deductions for or in respect of any taxes, charges or assessments taxed or imposed, or to be charged or assessed upon the said premises or any part thereof out of which the said annuity or yearly rent charge

(1) [1916] 2 A. C. 429. (2) [1920] 3 K. B. 109.

is to issue by any present or subsequent Act of Parliament." Now Mr. Eales, in the course of his most acute and vigorous argument for the defendant on this point, submitted that the matter was now governed by the provisions of the Income Tax Act, 1918, and the various provisions thereof cited by him. I need only mention those provisions without setting out their words, except in one instance. They were these. First s. 170, sub-s. 2, of the 1918 Act, which provides: "Where tax is charged on any composition for, or any rent or payment in lieu of, tithes or teinds, the occupier of the lands and premises charged with the composition, rent, or payments, shall be answerable for the tax so charged, and may deduct the sum out of the next payment on account thereof." Next he cited Sch. A, No. II., r. 3; Sch. A, No. VII., rr. 6 and 7; and Sch. A, No. VIII., rr. 3 and 4. Finally, he cited the All Schedules Rules, rr. 19 and 21, and also r. 23, which last provides as follows: Rule 23 "(1.) A person who refuses to allow a deduction of tax authorised by this Act to be made out of any payment, shall forfeit the sum of 50*l*. (2.) Every agreement for payment of interest, rent, or other annual payment in full without allowing any such deduction shall be void." Thus, upon the words of the Income Tax Act, 1918, if taken apart from the Act of 1749, it would seem that the defendant is right in making his deduction. The question here is whether or not the Act of 1749 is to prevail against the Income Tax Act, 1918. In support of the defendant's contention that it does not so prevail, Mr. Eales relies primarily on s. 213 of the Income Tax Act, 1918. I need not set out the words of that important section. Suffice it to say that it provides in substance that there shall be no exemption from income tax by reason of letters patent granted to any person or corporation, and that no statute which grants any salary, annuity or pension to any person free of income taxes shall exempt. Upon a fair construction of the actual and express words of s. 213, I am of opinion that the Act of 1749 does not fall within its provisions. The words of s. 213 are not wide enough.

The next question is whether the general provisions of the Income Tax Act, 1918, override the express enactment in the

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Act of 1749. It is clear that the words of the Act of 1749 are sufficient to include income tax: see the decision of the Court of Appeal, *Pole-Carew* v. *Craddock*. (1) Upon the whole, I come to the conclusion that the maxim "Generalia specialibus non derogant" here applies: see Maxwell on Statutes, 6th ed., p. 313 and the following pages; Craies on Statute Law, 2nd ed., p. 312 and the following pages, and per Lord Selborne L.C. in *Seward* v. *The Vera Cruz* (2) The view I have ventured to express is not, I think, inconsistent with any of the decisions cited in Dowell on Income Tax, 8th ed., p. 273, in his notes to s. 213 of the Income Tax Act, 1918. It is to be pointed out that income tax is in fact paid on the 77*l*. The defendant, for example, is assessed under Sch. A as the owner of the lands. The only question is whether, after he has paid it, he is entitled to deduct it as against the plaintiff. In view of the opinion I have expressed as to the continued operation of the Act of 1749, it is unnecessary to consider the ingenious arguments framed by Mr. Edwardes Jones upon such cases as *Brooke* v. *Price* (3) and *Booth* v. *Booth*. (4)

Such are the points in this most unusual case. I hope that my judgment fairly covers the extraordinarily wide range of points argued before me. I am much indebted to counsel on both sides for their learning and research. I must hold, for the reasons given, that the plaintiff is entitled to each of the declarations asked for by him. The defendant must pay the costs of the action. The payment of the money, the 124*l*. odd, will have to be enforced either by an application in the Chancery Division, or by the method indicated by the Act. The plaintiff is entitled to High Court costs.

Judgment for plaintiff.

Solicitors for plaintiff: *Markby, Stewart & Wadesons.*

Solicitors for defendant: *Halse, Trustram & Co., for F. T. Tanqueray, Woburn.*

(1) [1920] 3 K. B. 109.
(2) (1884) 10 App. Cas. 59, 68.
(3) [1917] A. C. 115.
(4) [1922] 1 K. B. 66.

J. R.

DURHAM COUNTY COUNCIL *v.* TANFIELD OVERSEERS.

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Oct. 25.

Rating—County Rate—Basis—Assessable Value of Collieries—Actual Output during previous Twelve Months—Output reduced by Strikes—True Principle of Valuation.

An assessment committee, acting in accordance with a practice which had always existed in the union, assessed the collieries in one of the parishes by ascertaining their net annual value upon the basis of the actual output of coal during the previous twelve months. Owing to strikes there had been no output of coal during four of the previous twelve months. The county council, for the purposes of the county rate basis and of the rate made thereon, refused to follow the prevailing practice, and assessed the collieries at a larger sum. On appeal by the Overseers against the county rate basis and the rate made thereon, quarter sessions held that the practice of taking the actual output for the previous twelve months should have been followed, and that the values of the collieries as found by the assessment committee ought to be substituted in the county rate basis for those appealed against:—

Held, that the case must be remitted to the quarter sessions to ascertain the true assessable value of the collieries; and that there was no obligation of law requiring that the existing practice should be followed, the only question being what in fact was the true assessable value of the collieries, the test of which was what a tenant would give for them in the coming year.

CASE stated by the Court of quarter sessions for the county of Durham for the opinion of the King's Bench Division on appeals by the appellants, the Overseers of the parish of Tanfield, against such part of the basis or standard for the county rate of the county of Durham, prepared by the respondents, as affected the said parish, and also against the rate of assessment upon the said basis or standard for which a precept dated November 10, 1921, had been issued to the guardians of the union in which the parish was comprised. The appeals came on for hearing at the adjourned general quarter sessions of the peace, held at Durham, for the said county, on February 23 and 24, 1922, when the Court adjudged and determined that the appeal against the basis or standard and the appeal against the rate or assessment be allowed, and that the county rate basis be reduced from 39,959*l.* assessable value to 36,101*l.* assessable value, such reduction to take effect for the period covered by the aforesaid precept

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of November 10, 1921, subject to the opinion of the King's Bench Division of His Majesty's High Court of Justice upon the following case :—

1. The respondents were the county council of the administrative county of Durham, and as such were the authority for the making, assessing, and levying of all county rates and for the preparation and revision of the basis or standard for the county rate.

2. The appellants were the Overseers of the parish of Tanfield in the said county. The parish was within the union of Lanchester.

3. On July 27, 1921, a basis or standard for fair and equal county rates in the county of Durham was allowed and confirmed by the respondents. In the basis or standard the assessable value of the said parish was fixed at 39,959*l.*

4. On September 19, 1921, the appellants gave notice of appeal to the Court of quarter sessions against the assessment. The grounds of the appeal were that the parish was rated on a sum beyond the full and fair annual value of the property therein liable to be assessed towards the county rate.

5. On November 10, 1921, the respondents made a county rate in which the said parish was assessed upon the sum of 39,959*l.* contained in the said basis.

6. On December 6, 1921, the appellants gave notice of appeal against the rate. The grounds of the appeal were that the parish was overrated in the said rate ; that the aforesaid sum did not then represent the true assessable value of the property rateable to the relief of the poor in the parish but was in excess of such true assessable value ; that the value of a part of the property so assessed was in an altered state, such part, namely the collieries, having been materially reduced in value ; and that the proportion of the rate assessed on the said parish was unequal, unjust, and excessive.

7. The two appeals were heard together at the adjourned quarter sessions held on February 23 and 24, 1922. At the hearing of the appeals it was agreed by counsel for the respondents and the appellants that the sole question in

dispute in the appeals was as to the assessable value of the collieries within the said parish. It was further agreed that no question arose in the appeals as to the assessable value of the colliery houses within the parish.

8. At the hearing the following facts were proved or agreed :—

(*a*) In 1914 a basis or standard for fair and equal county rates in the county was allowed and confirmed by the respondents and the same remained in force within the county subject to alterations and adjustments on appeals until the year 1921, when the county rate basis appealed against was allowed and confirmed as set out in para. 3 hereof.

(*b*) In the said basis made in the year 1921 the collieries in the parish of Tanfield were assessed at 13,246*l*. rateable value and the said rateable value was included in the total rateable value of the parish when the respondents made the county rate of November 10, 1921.

(*c*) The collieries were assessed for the year 1921–1922 by the assessment committee for the Lanchester Union at 9388*l*. annual value.

(*d*) The said assessment for the Lanchester Union was arrived at in accordance with a practice which was in force and had always existed within the Union, in which both the assessment committee and the proprietors of the collieries acquiesced, and by which they considered themselves bound. Under the practice the net annual value of collieries within the Union was arrived at each year for the purpose of making and raising the rates for the subsequent year upon the basis of the actual output of coal from each colliery during the previous twelve months from July 1 to June 30. For this purpose the Assessment committee ascertained in the case of each colliery or part of a colliery within each parish of the Union : (1.) the actual number of tons of coal got from under each parish by each colliery during

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the previous twelve months; (2.) the actual number of tons of coal brought to bank by each colliery owning pit shafts within each parish during the said period. The first of the said figures was then multiplied by a number of pence per ton which varied with the thickness and depth of the seam from which the coal was got. It was agreed by the respondents and the appellants that a fair average of the said number of pence within the Union was approximately 6*d.*, this figure representing the annual value per ton or annual tonnage rent such as is usually reserved in mining leases. Approximately ·75*d.* per ton of coal brought to bank (representing the annual value of the fixed plant and machinery) was then added to this sum thus arrived at, and the total, averaging 6·73*d.* per ton, was taken as the net rateable value of the colliery or part of a colliery in question.

(*e*) The said practice with minor variations was in force throughout all the unions within the county of Durham.

(*f*) The new county rate basis of 1914 was allowed and confirmed by the respondents at the figures adopted and put forward by the appellants and the same practice was followed.

(*g*) Before and during the twelve months elapsing between July 1, 1920, and June 30, 1921, there was a growing industrial depression aggravated by two strikes which occurred throughout the whole of the coalfields in the county of Durham during the said twelve months. The first of the strikes lasted from October 18 to November 3, 1920, and the second from April 1 to June 30, 1921. In consequence of the strikes there was no output from the collieries during 108 days or about one-third of the said period of twelve months.

(*h*) In October, 1921, when fixing the rateable values of the collieries within the parish of Tanfield for the purpose of rating the same in 1922, the assessment

committee followed the practice and took the actual output of the collieries during the said period from July 1, 1920, to June 30, 1921, and assessed the collieries at 9388*l.*

(*i*) For the purpose of making the new county rate basis in 1921 and for the purpose of the rate made on November 10, 1921, the respondents refused to follow the said practice and assessed the collieries in the parish of Tanfield at the net annual value of 13,246*l.*

9. It was contended on behalf of the appellants :—

(i.) That the actual output of coal from the collieries for the period from July 1, 1920, to June 30, 1921, should be taken for the purpose of ascertaining the assessable value of the collieries for the county rate basis allowed and confirmed on July 27, 1921.

(ii.) That by reason of the said method of valuation adopted by the respondents, the County Council of Durham, for rating purposes the respondents got their rate upon the coal not worked in the year from July 1, 1920, to June 30, 1921, and that if their method were followed for the purpose of assessing the said collieries for the year from July 1, 1921, to June 30, 1922, the respondents would get their rate again in that or some subsequent year upon the coal when it was in fact worked.

(iii.) That by following the practice adopted by the appellants the true assessable value of the said collieries had been arrived at, inasmuch as, taking one year with another, the collieries were thereby assessed on the basis of actual output.

(iv.) That it would be inequitable to allow the respondents to depart from a practice in force within the county for many years.

(v.) That, inasmuch as the tenant of a colliery paid his royalty rents at the end of the year, the said practice gave effect to the principle laid down by the Parochial Assessments Act, 1836, s. 1, and was, therefore, by

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virtue of the County Rates Act, 1852, the correct and legal method of assessment for the purposes of the county rate.

(vi.) That the appeal ought to be allowed and that the assessable values adopted by the Lanchester Union for the purpose of rating the collieries within the said period should be substituted for the figures adopted in the county rate basis or standard.

10. It was contended on behalf of the respondents :—

(i.) That while the practice was generally a fair and proper method of arriving at the assessable value of the collieries it was not so for the purpose of arriving at the value for the year from July 1, 1921, to June 30, 1922, which followed an exceptional year in which long strikes had taken place.

(ii.) That in arriving at the annual value of the collieries for the purpose of the county rate basis the actual output figures of the collieries for the previous year were only relevant if the same were first adjusted by increasing or decreasing the same in accordance with the fair expectation of future strikes and other stoppages, as compared with the actual strikes and stoppages of the previous year.

(iii.) That the actual output for the year from June 30, 1920, to July 1, 1921. should be taken as the output for eight months only and should be multiplied by 1·5 for the purpose of arriving at the prospective output for the following year.

(iv.) That a hypothetical tenant would not in fact have expected the said collieries to be stopped by any cause for any lengthy period in the year from July 1, 1921, to June 30, 1922, but that on the contrary he would expect a cessation of industrial strife and a period of peace and increased output.

(v.) That the county rate basis appealed against was just and equitable and made a fair allowance for prospective stoppages of the collieries.

(vi.) That the respondents had never agreed to follow

the said practice for the purpose of arriving at the county rate basis and had not so followed the same as to make it equitable that they should be bound thereby.

(vii.) That to follow the said practice for the purpose of making a county rate basis or standard would involve the making of a new basis or standard after each year for all parishes containing collieries within the county.

(viii.) That the appeals should be dismissed.

11. Quarter sessions held that upon the facts set out in para. 8 hereof the practice of taking the actual output for the previous year ending June 30 ought to have been followed, and that the values of the collieries as found by the assessment committee ought to be substituted in the county rate basis in the place of those appealed against, and they allowed the said appeals as stated above.

12. The question for the opinion of the Court was whether they were right in so holding and in allowing the said appeals.

W. Hedley (*Mortimer K.C.* with him) for the appellants. The quarter sessions held that the existing practice of taking the actual output for the previous year ought to have been followed as a matter of law; but owing to the strikes the past year was not a normal one, and the appellants are not bound by the existing practice.

Mitchell-Innes K.C. and *S. G. Turner* for the respondents. The question raised by the case is a pure question of fact. The justices say in effect that the method of assessment adopted was not a fair and proper method. There is no statement that they found this as a matter of law. What they have really stated is a question of fact.

[They referred to *Farnham Flint, Gravel and Sand Co.* v. *Farnham Union.* (1)]

LORD HEWART C.J. This is a case stated by the Court of quarter sessions at Durham upon an appeal by the Overseers

(1) [1901] 1 K. B. 272.

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of the parish of Tanfield against a part of the basis or standard of the county rate for the county of Durham. It appears that the only question in issue was the question as to the assessable value of certain collieries. Para. 7 of the case says that "at the hearing of the said appeals it was agreed by counsel for the respondents and the appellants that the sole question in dispute in the said appeals was as to the assessable value of the collieries within the said parish." The collieries had been valued for the purpose of the poor rate by the assessment committee for the Lanchester Union for the period in question at a sum of 9388*l.* annual value, but for the purpose of the county basis or standard a former valuation at 13,246*l.* was still retained; and the question was whether in the circumstances the figure of 13,246*l.* ought to be reduced.

The case recites that the assessment for the poor rate—that is, the assessment at the lower figure—was arrived at in accordance with the practice which was in force and had always existed within the Union, in which both the assessment committee and the proprietors of the collieries acquiesced, and by which they considered themselves bound. That practice shortly was, that the net annual value of the collieries for the particular year was ascertained by reference to the actual output of coal during the previous twelve months from July 1 to June 30. Now it does not very clearly appear from the case whether it was contended on behalf of the then appellants that as a matter of law the practice which had prevailed should be continued notwithstanding that because of a strike the collieries during the year in question in that discussion had been closed for something like 108 days, or whether the argument was that upon all the facts the true conclusion as to the assessable value of these collieries was that it was no more than the figure at which they had been valued for the purpose of the poor rate. There are phrases in the case which encourage the one view and the other. For my own part I did for a time entertain the view that the case might be regarded as saying not more than this: that upon the facts the justices came to the conclusion that

the true assessable value was the value represented by the lower figure. But I have very great doubt, on looking further at the case and hearing the argument, whether the justices did not believe that as a matter of law they were bound to apply the familiar measure and to apply it without any modification at all, in spite of special circumstances. They found in para. 11 of the case "that upon the facts set out in para. 8 hereof the said practice of taking the actual output for the previous year ending the 30th June ought to have been followed and that the values of the said collieries as found by the said assessment committee ought to be substituted in the said county rate basis in the place of those appealed against," and they allowed the appeals. The practice which is there referred to is the practice which I have already mentioned, and is set out in para. 8 (*d*) of the case.

In these circumstances, as there is a real doubt whether the Court of quarter sessions believed that it was finding facts or expressing a view of the law, I think that this case ought to go back to the Court of quarter sessions in order that that Court may ascertain the true assessable value for the purpose of the county basis or standard, and that in approaching the determination of that question the Court of quarter sessions should clearly understand that there is no obligation of law which requires that that practice, however convenient it may be and however fairly it may work out over a period of years, must be observed. The question is, apart altogether from any suggestion that there is a sanction of law behind that practice, what in fact was the true assessable value.

AVORY J. I agree. Having regard to the fact that the Court of quarter sessions must be taken to have known that they could only state a case upon a question of law I myself feel no doubt that they did intend to state a question of law for the opinion of this Court—namely, whether they were bound to follow the practice set out in the case in para. 8; and if they so believed then I entertain no doubt that they were taking a wrong view of the law.

I only wish to refer to what was said in *Farnham Flint*,

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Gravel and Sand Co. v. *Farnham Union* (1), where A. L. Smith M.R., quoting from the case of *Hoyle* v. *Oldham Union* (2), said that what the assessment committee had to do was to "assess the occupiers 'for the coming year, and they had to say what at that moment in their judgment an hypothetical tenant from year to year would give as rent for those premises, after making allowance for the parliamentary deductions,'" and then he went on to deal with the dictum which had been attributed to Blackburn J. in the case of *Reg.* v. *Abney Park Cemetery Co.* (3)—namely that in estimating rateable value the general rule was to consider what a tenant from year to year would give during the year preceding the time of making the rate—and said that, if that dictum really was uttered by the learned judge, he, the Master of the Rolls, could not agree with it. He added that the test is not what the value was in the preceding year, but what a tenant would give in the coming year, and the amount that the tenant has worked out in the previous year—that was referring to the case of a mine—is not the basis on which to arrive at the rent that would be paid for the coming year. That is the true principle of law which has been applied in these cases, and I agree that the case should be remitted to the Court of quarter sessions for them to determine what is the true value upon that principle of law.

SANKEY J. I agree.

Appeal allowed and case remitted.

Solicitors for appellants: *Sharpe, Pritchard & Co., for Harold Jevons, Durham.*

Solicitors for respondents: *Maples, Teesdale & Co., for Mann, Longden & Mann, Sunderland.*

(1) [1901] 1 K. B. 272, 280. (2) [1894] 2 Q. B. 372.
(3) (1873) L. R. 8 Q. B. 515.

F. C.

[IN THE COURT OF APPEAL.]

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April 10, 11

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[1922. M. 2294.]

Emergency Legislation—Tort by public Official—Transfer of Liability for to Government Department—Ministry of Shipping (Cessation) Order, 1921—*Construction—Action against Board of Trade—Service of Writ.*

The plaintiffs in 1922 brought an action against the Board of Trade for money had and received. The money which it was sought to recover was alleged to have been wrongfully extorted from the plaintiffs in 1919 by the Shipping Controller under colour of his office, and it was alleged that, on the plaintiffs electing to waive the tort, he would have been personally liable to refund the money as having been received to their use. By the Ministry of Shipping (Cessation) Order, 1921, it was provided that the office of Shipping Controller should cease to exist, and that "All . . . . liabilities . . . . incurred by the Shipping Controller . . . . shall be transferred to the Board of Trade." The "Board of Trade" is the name given by statute to an unincorporated committee of the Privy Council. On an application to strike out the writ on the ground that the Board of Trade, as a department of the Crown, could not be sued:—

Held, that the intention of the Order was to transfer to the Board of Trade as a Government department the personal liabilities (if any such there were) of the Shipping Controller for any wrongful acts committed by him in his office, and that the Board was liable to be sued in respect of those acts notwithstanding that it was an unincorporated body.

Although the Board of Trade may in the above-mentioned circumstances be sued as a Government department, service of the writ must, unless the solicitor to the Board accepts service on their behalf, be effected upon the individual constituent members of the Board personally.

Where an official of a Government department wrongfully extorts a sum of money from a subject for the use of the Crown, and the injured party waives the tort,

Quaere, whether he can sue the official personally as for money had and received, or whether his only remedy is not by petition of right against the Crown.

APPEAL from Rowlatt J. at chambers.

The plaintiff company was in October, 1919, desirous of selling their ship *Holms Island* to certain foreign purchasers, and application was made to the Shipping Controller under reg. 39 c.c. of the Defence of the Realm Regulations for permission to effect the sale. The Shipping Controller gave his permission subject to the condition amongst others "that

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it is understood that the sum of 20,000*l.* must accrue to the Exchequer in respect of the sale." The sale was carried out, and the plaintiffs paid out of the price the stipulated sum to the Shipping Controller. On March 24, 1921, the Ministries of Munitions and Shipping (Cessation) Act was passed, by s. 1, sub-s. 1, of which "Any Order in Council . . . . fixing . . . . the date on which the office of Minister of Munitions . . . . or the office of Shipping Controller . . . . are to cease may—(*a*) vest and transfer . . . . in and to any Government department . . . . any property rights and liabilities held, enjoyed, or incurred by the Minister of Munitions or the Shipping Controller (or by any person who has held the office of Minister of Munitions or Shipping Controller)." On the same date the Ministry of Shipping (Cessation) Order, 1921, No. 447, was made under the powers of that Act, and by clause 3 of the Order "All property rights and liabilities held enjoyed or incurred by the Shipping Controller shall, by virtue of this Order, be transferred to and vest in the Board of Trade, who shall be deemed in law to be the successors of the Shipping Controller." By clause 7: "Where at the time of the transfer affected by this Order any legal proceeding is pending to which the Shipping Controller is a party the Board of Trade shall be substituted in such proceeding for the Shipping Controller, and such proceeding shall not abate by reason of the substitution." And by clause 9 (2.): "The Interpretation Act 1889 applies to the interpretation of this Order as it applies to the interpretation of an Act of Parliament." By s. 12 of that Act "The expression 'the Board of Trade' shall mean the Lords of the Committee for the time being of the Privy Council appointed for the consideration of matters relating to trade and foreign plantations." On July 5, 1922, the plaintiffs commenced this action against the Board of Trade to recover back the 20,000*l.* alleged to have been extorted from them by the Shipping Controller colore officii, the writ being indorsed "The plaintiffs' claim is for 20,000*l.* money had and received by the defendants to the use of the plaintiffs." (1) The

(1) The plaintiffs had previously taken proceedings before the War

plaintiffs proposed to serve the writ upon the Solicitor to the Board of Trade, but he refused to accept service on behalf of the Board, and thereupon they served it upon Sir Sydney Chapman, the Permanent Secretary of the Board of Trade. A conditional appearance to the writ was entered on behalf of the Board, and a summons was taken out to set aside the writ on the ground "that the Board of Trade as such, and as a Government department, cannot be sued."

The Master made the order asked for, and he also ordered the service of the writ to be set aside as irregular on the ground that the Board of Trade was not a corporation but a committee of named individuals, and that the writ should have been served on the several members of the committee personally. On appeal Rowlatt J. reversed the Master's order on both points, and ordered that the writ and service should stand good. The Board of Trade appealed to the Court of Appeal.

Sir Douglas Hogg A.-G. and *Ricketts* for the appellants. The transfer of the Shipping Controller's liabilities to the Board of Trade will not enable an action to be brought against the Board in respect of those liabilities unless the Shipping Controller could himself have been sued. But he could not have been so sued. His office was created by the New Ministries and Secretaries Act, 1916 (6 & 7 Geo. 5, c. 68), and there is nothing in that Act which gives the Shipping Controller any right to sue or imposes upon him any liability to be sued. Nor is there any statute authorizing an action to be brought against the Board of Trade in respect of such a claim as the present. When the Legislature intends compensation to be recoverable from a Government department for illegal acts done by it it makes express provision for the purpose. Thus under s. 460 of the Merchant Shipping Act, 1894, it is provided that where a ship has been detained by the orders of the Board of Trade as an unsafe ship without

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Compensation Court to recover this money, and while those proceedings were still pending they presented a petition of right for the recovery of the same sum; but as they refused to abandon their proceedings before the War Compensation Court the Attorney-General refused his fiat, and the petition of right came to an end.

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reasonable and probable cause the Board shall be liable to pay to the owner compensation for the loss sustained by him, and that an action for the compensation so payable by the Board may be brought against the Secretary to the Board of Trade by his official title as if he were a corporation sole. There is no corresponding provision in the Act and Order in Council of 1921 empowering a person injured by the acts of the Shipping Controller to recover compensation from the Board of Trade. The Board of Trade is not itself a corporation, but merely a committee of named persons. Moreover here the action is for money had and received, and therefore is in the nature of an action of contract. But it is well settled that where an agent of the Crown makes a contract on behalf of the Crown no action will lie against the agent, the only remedy being by petition of right. Nor, if the Shipping Controller's demand of the 20,000*l.* in the present case be treated as a tort, could the plaintiffs by suing him personally for that tort have obtained a declaratory judgment that they were entitled to compensation out of the revenue. In *Bombay and Persia Steam Navigation Co.* v. *MacLay* (1) the Shipping Controller had directed the diversion of the plaintiffs' ship and had subsequently cancelled that direction, whereby the plaintiffs lost the use of their ship in the interval. The plaintiffs brought an action against the holder of the office of Shipping Controller personally, claiming a declaration of their right to compensation against the Treasury. Rowlatt J. held that the action could not be maintained. It by no means follows that because certain liabilities are transferred to the Board of Trade the Board can be sued in respect of them. It may be that the remedy for them is not by action but by petition of right. In *Rowland* v. *Air Council* (2) Russell J. held that the Air Force (Constitution) Act, 1917, did not, by providing that "The Air Council may sue and be sued, and may for all purposes be described by that name," empower a plaintiff to sue the Air Council for a breach of contract. The Air Council was, like the Board of Trade, an unincorporated collection of individuals, and the

(1) [1920] 3 K. B. 402. (2) [1923] W. N. 64; 39 Times L. R 228.

object of the section was to authorize the use of the name "Air Council," not to give the plaintiffs new rights against the Crown. But if that is the case where a Government department is expressly empowered to sue and be sued a fortiori must it be so where, as here, there is no express power for the Board of Trade to be sued at all. But even if the writ disclosed a good cause of action, the service of it was bad. It should have been served personally on the several members of the Board.

Latter K.C. and *Needham* for the respondents. A Government department cannot make the payment of money a condition of the exercise of its discretionary powers, for it would amount to the assertion of a right in the executive to impose taxation without statutory authority: *Attorney-General* v. *Wilts United Dairies.* (1) Therefore the Shipping Controller in exacting payment to the Crown of part of the price of the plaintiffs' ship as a condition of permission to sell it was guilty of a tort, in respect of which he was personally liable. But if the plaintiffs had taken proceedings against the Shipping Controller for that exaction they could have waived the tort and sued him for money had and received, and the fact that he received the money on behalf of the Crown and not for himself would afford no answer to the action. In *Steele* v. *Williams* (2) where the defendant, a parish clerk, to whom the plaintiff applied for liberty to make extracts from the register of burials for the parish, charged him, on behalf of the rector who was entitled to the fees, a larger sum than was authorized by the statute, it was held that the action was rightly brought against the defendant. Parke B. said: "If a person acting for another insists on the payment of money on an illegal ground, he is the party to be sued for it." And Martin B. said: "Any person who illegally takes money under colour of an Act of Parliament is liable to be sued for it, though the money is not to go into his own pocket." Bailhache J. in *China Mutual Steam Navigation Co.* v. *MacLay* (3) applied that principle to an action against

(1) (1922) 91 L. J. (K. B.) 897. (2) (1853) 8 Ex. 625, 630, 632.
(3) [1918] 1 K. B. 33.

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the Shipping Controller. The holder of that office, Sir Joseph MacLay, having made an illegal requisition of the plaintiffs' ship, the plaintiffs sued the Shipping Controller personally claiming a declaration that the working of the ship since the date of the requisition was on their account and that they were entitled to the profits, and it was held that they were entitled to the declaration claimed. It is in the light of that state of the law that the Act and Order in Council of 1921 must be construed. They were intended to transfer the *personal* liabilities of the Shipping Controller, for the Act expressly authorizes the Order to transfer the liabilities incurred " by any person who has held the office of Shipping Controller." And those personal liabilities include the liability to be sued for money had and received in such a case as the present. But as it would be futile to transfer liabilities unless the transferees were liable to be sued, the Order must have meant that the Board as a Government department should be liable to be sued in respect of any wrongful acts which the Shipping Controller may have committed in the exercise of his office. The fact that the members of the Board of Trade are not incorporated is no objection. In *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (1) it was held that a trade union, although an unincorporated body, could be sued in its registered name, the House of Lords being largely influenced by the fact that the Legislature in the Trade Union Acts had created a body which could hold property. The Board of Trade are in a similar position, for the Order in Council contemplates that they can hold property: it expressly provides for the transfer to them of the property of the Shipping Controller. The objection to the service of the writ is not open to the appellants; it formed no part of the complaint specified in the summons.

Ricketts in reply. The liabilities which are transferred by the Order are not liabilities to third persons but liabilities to the Crown, such as the obligation to account for money received. The Shipping Controller's personal responsibility for his torts was left untouched by the Order.

(1) [1901] A. C. 426.

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BANKES L.J. In this case an action was brought by the Marshal Shipping Company against the Board of Trade upon a writ indorsed with a claim to recover a sum of 20,000*l.* as money had and received by the defendants to the use of the plaintiffs. That writ was served upon Sir Sydney Chapman, the Permanent Secretary of the Board of Trade, who entered a conditional appearance on behalf of the Board. A summons was then taken out to set aside the writ on the ground "that the Board of Trade as such and as a department of the Crown cannot be sued." It was contended before us that even if the action would lie at all events the service was bad and should be set aside. In my opinion that contention is well founded. Under no circumstances can the service on Sir Sydney Chapman as representing the Board be a good service, for this reason, that the Board of Trade is merely the name given to an unincorporated committee of named individuals. If there is a right to sue that committee under the name of the Board of Trade there is no way of serving the members of that committee provided by the rules except that of personal service. There is no rule of Court applicable to this case which allows personal service to be dispensed with. Therefore I think that the appeal so far as it claims that the service of the writ should be set aside must be allowed.

The much more important point is whether the action will lie against the Board of Trade at all. Taking the writ as it stands it is clear that it will not. For the indorsement states the claim to be one arising out of contract, and no action can lie against a department of the Crown on such a claim, the proper proceeding being by way of petition of right. But it was said, and I understood the statement to be accepted by the Attorney-General, that the indorsement in the writ did not express the plaintiffs' real cause of action, and it was desired by both parties that the decision of the Court should proceed upon the real facts of the case although not disclosed on the writ. The real complaint of the plaintiffs appears to be this. They were the owners of a

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ship which they desired to sell to a foreign purchaser, and such a sale could not be lawfully carried out except by the licence of the Shipping Controller. The Shipping Controller insisted, as a condition of granting his licence, that the plaintiffs should hand over to him a certain percentage of the proceeds of the sale. The plaintiffs accordingly having sold the ship handed over to him the percentage insisted upon, which amounted to 20,000*l.*, and they now claim to recover back that money as having been extorted from them colore officii. That claim, as it seems to me, does not arise out of contract, but is a claim in tort, and as such could only have been enforced against the Shipping Controller in his personal capacity, though it may be that when the action had been so brought against him personally it was open to the plaintiffs to waive the tort and sue for money had and received. We were referred to certain authorities—*Steele* v. *Williams* (1) and *Snowdon* v. *Davis* (2)—which I think establish beyond all question that where an action is brought to recover back money extorted colore officii the action lies against the person who actually extorted the money even though he was acting in a representative capacity. And effect was recently given to that proposition by Rowlatt J. in *Bombay and Persia Steam Navigation Co.* v. *MacLay* (3) where he said: "No action can be brought against the Shipping Controller as such, as an action can be brought against the Secretary of State for India in Council. The action must be brought against Sir Joseph MacLay, if at all, as an individual. It has long been established that if an official of the State does something which if done by any one else would be a tort, and there is no law authorizing him, in virtue of his office, to do that particular thing, he must, notwithstanding his official position, answer for it in his own name." The Shipping Controller was established by the New Ministries and Secretaries Act, 1916, s. 5, and it is conceded that there was nowhere any provision by the Legislature giving authority to sue the Shipping Controller

(1) 8 Ex. 625. (2) (1808) 1 Taunt. 359.
(3) [1920] 3 K. B. 402, 406.

in his official title as if he were a corporation. That then would be the position of things if the office of Shipping Controller continued to exist. But it has been abolished by the Ministry of Munitions and Shipping (Cessation) Act, 1921, and the Ministry of Shipping (Cessation) Order, 1921, No. 447, and the important question in this case turns on the proper construction to be put on that statute and Order. By s. 1 of the Act it is provided that an Order in Council fixing the date when the office of Shipping Controller is to cease may (*a*) "vest and transfer . . . . in and to any Government department . . . . any property, rights and liabilities held, enjoyed, or incurred by . . . . the Shipping Controller (or by any person who has held the office of . . . . Shipping Controller)"; (*d*) "Provide for the Government department to which any such property, rights, liabilities, powers or duties are transferred being deemed in law to be, as respects such property, rights, liabilities, powers or duties, the successor of . . . . the Shipping Controller." Then clause 3 of the Order repeats the language of the Act and provides that the property rights and liabilities of the Shipping Controller shall be transferred to the Board of Trade, who shall be deemed in law to be the successors of the Shipping Controller. Mr. Ricketts contended that that clause was inoperative, for that there were no liabilities of the Shipping Controller which could be transferred; none in contract, for a breach of contract would be the subject, not of an action against the Shipping Controller, but of a petition of right to the Crown; and none in tort, for a liability in tort would not be a liability of the Shipping Controller, but of the individual person filling that office, and the language of the clause is not apt to transfer that personal liability. But we ought not to put a construction on the clause which would make it inoperative, and I think we must assume that the Order in Council in providing as it did intended to transfer to the Board of Trade the personal liabilities in tort of the person filling the office of Shipping Controller, and intended to transfer them none the less because the Board to whom they were transferred were an unincorporated group of individuals.

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But as it would be meaningless to transfer liabilities without rendering them enforceable against the transferees by action the Legislature must have intended that the Board of Trade should be liable to be sued for the Shipping Controller's torts. And that view is emphasized by clause 7, which says that "Where at the time of the transfer affected by this Order any legal proceeding is pending to which the Shipping Controller is a party, the Board of Trade shall be substituted in such proceeding for the Shipping Controller." That clause disposes of any objections to the Board of Trade being sued in the name of the Board of Trade as a Government department. For these reasons I am of opinion that though the appeal succeeds on the question of the service of the writ, it fails on the more important question of the liability of the Board of Trade to be sued under the very special provisions of this statute and Order.

SCRUTTON L.J. This appeal raises a question, in my view of very considerable difficulty, on the language of a not very clearly worded Act of Parliament and Order in Council. I personally feel that the whole subject of proceedings against Government departments is in a very unsatisfactory state. I feel that it is of great public importance that there should be prompt and efficient means of calling in question the legality of the action of Government departments which, owing to the great national emergencies arising out of the war, have been inclined to take action that they considered necessary in the interests of the State without any nice consideration of the question whether it was legal or not, and I hope that the committee which is now considering the question of proceedings against the Crown will be able to give the subject more effective remedies against Government departments than he has at present.

In this case the plaintiffs issued a writ against the Board of Trade claiming 20,000*l.* as money had and received by the defendants to the use of the plaintiffs. That writ does not make it clear what the dispute is about. But it appears from the statement of the Attorney-General, accepted by

Mr. Latter, that the subject of the contest is this: The Shipping Controller had power to prevent the sale of ships to foreigners except under his licence. For reasons which may be right or wrong—I express no opinion whatever on the merits—he required, as a condition of a certain British ship being sold to a foreigner, that a portion of the price should be paid to the State. I assume that the plaintiffs took the licence and paid the sum demanded under protest. In those respects the case is very like one which was recently decided by the House of Lords—*Attorney-General* v. *Wilts United Dairies* (1)—and I take the writ as intended to be a claim against the Board of Trade as the successors of the Shipping Controller for money wrongfully demanded under duress, the tort being waived and a claim made in assumpsit.

Under those circumstances there are three objections made by the defendants, one to the service of the writ, and two to the writ itself. The writ was served on the Permanent Secretary of the Board of Trade. The Board of Trade appears to be an unincorporated committee of the Lords of the Privy Council. I am not aware of any provision which enables an unincorporated body of named persons to be served with a writ by service on one of their servants. It therefore appears to me that the objection to the service in this case is well founded. As far as I can see at present that objection can be cured by the plaintiffs going to the several distinguished persons who constitute the committee and astonishing them by serving them with a writ which will probably bring it to their attention for the first time that they are members of a committee called the "Board of Trade." But I should imagine that the Solicitor to the Board of Trade would be well advised if he relieved those distinguished persons of the annoyance of personal service by accepting service on their behalf.

I pass now to the two more substantial objections which are taken to the writ itself. They are thus stated in the summons to set aside the writ. It is objected "that the

(1) 91 L. J. (K. B.) 897.

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Board of Trade as such and as a department of the Crown cannot be sued." I look upon that as containing two distinct objections, one that the Board of Trade cannot be sued "as such"—that is to say, having regard to the fact that it is an unincorporated body, and secondly that, even if that objection is got over, it cannot be sued because it is a department of the Crown. Whether those objections are sound depends on the construction to be put on the Act and Order in Council of 1921. The Act provided by s. 1, sub-s. 1 (*a*), that an Order in Council might "vest and transfer . . . . in and to any Government department . . . . any property, rights and liabilities held, enjoyed, or incurred by the . . . . Shipping Controller (or by any person who has held the office of . . . . Shipping Controller)." That appears to show an intention to transfer not merely the liabilities which the Shipping Controller had incurred in his official capacity, if indeed such a liability were possible, but also the liabilities which he had incurred personally for torts committed by him in the purported exercise of his office. And the Order in Council, which was made under that Act on the same day that the Act was passed and is obviously intended to be read along with it, provides by clause 3 that "All property rights and liabilities held enjoyed or incurred by the Shipping Controller shall . . . be transferred to and vest in the Board of Trade who shall be deemed in law to be the successors of the Shipping Controller." The only power given to the Board of Trade to hold property is a power to hold land which is given by s. 66 of the Harbours Act, 1861 (24 & 25 Vict. c. 47), and that section provides that such land shall "vest in the persons for the time being constituting the Board of Trade, and upon their vacating their offices shall be transferred to and vested in their successors in office, in a perpetual succession." What Parliament and the draftsman of the Order meant by property other than land being transferred to a body of changing persons without perpetual succession I do not know, but they apparently contemplated that it might be so transferred. To the first question then raised by the summons—namely, whether the Board of Trade being an

unincorporated body can be sued, I think the answer must be that the obvious intention of Parliament and of the framers of the Order was to render the Board liable to be sued in respect of any matters for which the Shipping Controller was liable to be sued. My reasons for so thinking are the same as those which induced the House of Lords in *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (1) to hold that a trade union could be sued—namely, that a body which can own property must be capable of being sued.

The other point raised by the summons, that the Board of Trade as a department of the Crown cannot be sued is one of considerable difficulty, upon which I do not propose to express a final opinion. It seems that the question which was intended to be raised was whether, if the Shipping Controller in the exercise of his office extorted a payment of money which he had no right to demand, the party injured thereby could waive the tort and sue him personally for money had and received instead of making the recovery of the money the subject of a petition of right to the Crown. That I regard as a very difficult question, and one which ought not to be decided at this stage on a motion to set aside the writ. I think that that question should be left to be dealt with later on, and that for the present the writ should be treated as holding good. For these reasons I think that while the appeal fails as to the setting aside of the writ, it succeeds as to the setting aside of the service.

ATKIN L.J. I agree. In the first place I think the plaintiffs were entitled to sue the Board of Trade in tort under the title of the Board of Trade. The Board of Trade is merely an unincorporated committee of the Privy Council, but by s. 65 of the Harbours Act, 1861, and the Interpretation Act, 1889, a short title "the Board of Trade" is provided for the persons constituting that committee for the time being, and I think that they can be sued in that name, not indeed as individuals but in their official capacity. Whether they can be sued

(1) [1901] A. C. 426.

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for the particular cause of action in this case is another matter. But the Act of 1921 authorizes an Order in Council vesting in a Government department "any property rights and liabilities held enjoyed or incurred . . . . by the Shipping Controller," and I cannot conceive a liability which cannot be enforced by an action. An unenforceable liability seems to be a contradiction in terms. Any liability therefore of the Shipping Controller which is transferred to the Board of Trade must be capable of being enforced by action against the Board. What then are those liabilities? I think that the liabilities of the Shipping Controller which were contemplated by the Order were his personal liabilities for wrongful acts done by him under colour of his office, and that it was those personal liabilities that were transferred to the Board of Trade, who might be sued in respect of them. Indeed unless it is to those personal liabilities that the Order refers it is difficult to see what it can refer to. For the Shipping Controller could be under no liability in his official capacity; such liability would be a liability of the Crown, and there can be no such thing, for no action can be brought against the Crown. That it was his personal liabilities that the Act and Order contemplated is reasonably clear from the authority given in the Act to make an Order transferring the liabilities incurred by the Shipping Controller "or by any person who has held the office of . . . . Shipping Controller." Whether or not the liability sought to be enforced in this case was one which could have been enforced personally against the Shipping Controller I am not prepared to say. I can well understand that there may be difficulty. The Shipping Controller may have been liable in tort for an unauthorized act done by him, and if he accounted to the Government for the proceeds of that tort, which no doubt he did in this case, and the plaintiffs chose to waive the tort, it may be that under those circumstances he could not be sued as for money had and received, but that the only remedy would be by petition of right against the Crown. I express no opinion on that point except to say that I think the matter admits of far too much doubt to justify us in setting aside

the writ on the ground that it fails to disclose a good cause of action. I say nothing about the service of the writ, which I agree was irregular. On that point the appeal succeeds, while in other respects it fails.

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Atkin L.J.

Appeal allowed as to validity of service. (1)

Solicitor for appellants: *Solicitor to the Board of Trade.*
Solicitor for respondents: *R. S. Fraser.*

J. F. C.

JACKSON *v.* VOSS.

1923 *April* 30.

Revenue—Income Tax—Deduction in Respect of Children—Child en ventre sa mere at Commencement of Year of Assessment—Child subsequently born—Finance Act, 1920 (10 & 11 *Geo.* 5, *c.* 18), *s.* 21, *sub-s.* 1.

Sect. 21, sub-s. 1, of the Finance Act, 1920, provides that a person who proves that he has living at the commencement of the year of assessment a child who is under the age of sixteen years shall be entitled to a deduction from his assessment to income tax in respect of that child:—

Held, that in the construction of this section the general rule that the expression "children living" includes a child en ventre sa mere which is subsequently born has no application.

CASE stated by General Commissioners for the Income Tax Acts.

The respondent Voss appealed against an assessment made upon him for the year 1921–22 in the sum of 350*l.* under Sch. D as a solicitor's managing clerk. His return stated his total income from all sources as 400*l.* 12*s.* 2*d.*, and he claimed deductions in respect of three children—36*l.* for the first child and 27*l.* for each of the two other children. The appellant Jackson, the Inspector of Taxes, accepted the figure of 400*l.* 12*s.* 2*d.*, but was prepared to allow only a

(1) On April 24, shortly after the judgment in this case was delivered, the President of the Board of Trade, Sir P. Lloyd-Greame, announced in the House of Commons that he had given instructions that for the future "where an action in fact lies, the Board of Trade solicitor shall accept service."

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deduction of 36*l.* for one child on the ground that the other children, who were twins, were not living at the commencement of the year of assessment—namely, April 6, 1921. It was proved that the twin children were born on July 17, 1921.

The respondent contended that the words "children living" at a particular date included a child en ventre sa mere at that date who was subsequently born alive, and that a series of decisions had established a fixed rule that those words (in contradistinction to the words "children born") should always receive that construction unless the context forbade it, and that there was nothing in the context of s. 21 of the Finance Act, 1920 (1), which forbade this construction.

The appellant contended that a child en ventre sa mere was not a child living within the meaning of s. 21 of the Finance Act, 1920.

The Commissioners upheld the respondent's contention and allowed the deductions claimed by him. The question was whether they were right in so holding.

Sir T. Inskip S.-G. (*R. P. Hills* with him) for the appellant. The rule that the expression "children living" includes a child en ventre sa mere, which is applicable in certain cases, does not apply in the construction of s. 21, sub-s. 1, of the Finance Act, 1920.

[He was stopped.]

Alan Leslie for the respondent. The rule in question is of general application. In *Reeve* v. *Long* (2) the House of Lords decided that a contingent remainder could be taken by a child en ventre sa mere; and in *Thellusson* v. *Woodford* (3)

(1) Finance Act, 1920, s. 21, sub-s. 1: "If the claimant proves that he has living at the commencement of the year of assessment any child who is . . . . under the age of sixteen years . . . . he shall, subject to the provisions of this section, be entitled in respect of one child to a deduction of 36*l.*, and in respect of each subsequent child to a deduction of 27*l.* The expression 'child' in this provision includes a stepchild and an illegitimate child whose parents have married each other after his birth."

(2) (1694) 1 Salk. 227.

(3) (1799) 4 Ves. 227, 322.

Buller J., speaking of a child en ventre sa mere, said: "Such a child has been considered as a non-entity. Let us see what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian. Some other cases put this beyond doubt. In *Wallis* v. *Hodson* (1) Lord Hardwicke says, 'The principal reason I go upon in the question is, that the plaintiff was en ventre sa mere at the time of her brother's death, and consequently a person in rerum naturâ, so that both by the rules of the common and civil law, she was, to all intents and purposes, a child, as much as if born in the father's lifetime.'" In the same case Buller J., who had been a party to the earlier decision in *Doe* v. *Clarke* (2), where it was suggested that the rule applied only where it was for the benefit of the child to apply it, said (3) that there was no reason for confining the rule in that way, such a child being entitled to all the privileges of other persons: see also per Lord Eldon in *Thellusson* v. *Woodford*. (4) The principle of construction now contended for was restated in *In re Burrows* (5) and in *In re Wilmer's Trusts* (6), and was applied in *Williams* v. *Ocean Coal Co.* (7), where a posthumous child was held to be a dependant for the purposes of the Workmen's Compensation Act, 1897. In *Villar* v. *Gilbey* (8) the House of Lords distinguished the expression "children born in my lifetime" from "children living," and held that the former of these expressions includes a child en ventre sa mere only if that construction is for the benefit of the child, but the House accepted the general rule in the construction of the expression "children living," which is a term of art and therefore to be applied in all circumstances, just as the

(1) (1740) 2 Atk. 115, 117.
(2) (1795) 2 H. Bl. 399.
(3) 4 Ves. 323.
(4) (1805) 11 Ves. 112, 149-50.
(5) [1895] 2 Ch. 497.
(6) [1903] 2 Ch. 411.
(7) [1907] 2 K. B. 422.
(8) [1907] A. C. 139.

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word "charity" must receive its legal meaning in the construction of the Income Tax Act: see per Lord Macnaghten in *Special Commissioners of Income Tax* v. *Pemsel*. (1) Where the Legislature uses a word or phrase which has received a specific meaning it must be taken, in the absence of any indication of a contrary intention, that it uses it in that accepted sense: see also per Lord Cairns in *Partington* v. *Attorney-General* (2) as to the principles applicable in construing a taxing statute.

ROWLATT J. I feel no doubt about this case. I am quite alive to the wide bearing of the rule, in different classes of cases, that the words "child living" are to be construed as including a child en ventre sa mere. I bear in mind also that in *Special Commissioners of Income Tax* v. *Pemsel* (8) Lord Macnaghten said that the word "charity" should be construed in the Income Tax Act as bearing the artificial meaning given to it in the Court of Chancery since the reign of Elizabeth; and further, that in a taxing Act the subject is not to suffer a tax which is not imposed in clear words. In this case the respondent says that because his wife in July gave birth to twins he can, in the words of s. 21, sub-s. 1, of the Finance Act, 1920, prove that he had living at the commencement of the year of assessment children under the age of sixteen. The argument appears to me to be untenable. By the Finance Act, 1920, what was intended was that the size of a man's family—the number of his children—should be counted on a particular date and an allowance made to him accordingly. When, in effect, the section says that, I cannot believe that it was ever intended that the man claiming the allowance could, on a subsequent date, go back and count as actually living on the first date children who were not then born. The section is meant to protect a man with a family, and it has done so in the way I have indicated. It is said for the respondent that a man incurs expense before the child is born. That is true, but admittedly he can get no allowance if the child is born on such a date in the year that it could not

(1) [1891] A. C. 531, 580 et seq. (2) (1869) L. R. 4 H. L. 100, 122.

have been en ventre sa mere at the commencement of the year of assessment—namely, on April 4. A definite date has to be taken for this purpose, April 4, and a child actually born after that date is excluded for that year in considering the allowance to which the man is entitled, but the allowance is obtained at the other end. This case is in a different region from those in which the expression "child living" has been construed as including a child en ventre sa mere. The appeal must be allowed.

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Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitor for respondent: *G. P. Voss.*

J. S. H.

[IN THE COURT OF APPEAL.]

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April 23, 24; *May* 9.

THE KING *v.* SECRETARY OF STATE FOR HOME AFFAIRS.

Ex parte O'BRIEN.

Ireland—Restoration of Order—Order for Internment in Irish Free State of Person residing in England—Validity of—Restoration of Order in Ireland Regulations, 1920, *Reg.* 14 *B—Irish Free State Constitution Act,* 1922 (13 *Geo.* 5, *Sess.* 2, *c.* 1)*—Habeas Corpus—Control of Internee.*

By reg. 14 B of the regulations made in August, 1920, under the Restoration of Order in Ireland Act, 1920, power was given to the Secretary of State to order the internment in a place in the British Islands specified in the order of any person suspected of acting or having acted or being about to act in a manner prejudicial to the restoration or maintenance of order in Ireland, and it was thereby provided that the person so interned should be subject to the like restrictions and might be dealt with in like manner as a prisoner of war except so far as the Secretary of State might modify such restrictions.

On December 5, 1922, the Irish Free State Constitution Act was passed, by which the Irish Free State was given a distinct and independent executive.

On March 7, 1923, an order, purporting to be made under the said reg. 14 B, was issued by the Secretary of State ordering that the applicant, who was then residing in England, should be interned in such place

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in the Irish Free State as the Irish Free State Government should determine. The applicant was arrested in London under that order and conveyed to Dublin, where he was interned. He was so deported under an agreement between the Secretary of State and the Irish Free State Government that if a certain advisory committee appointed by the Secretary of State for that purpose reported that he ought not to have been interned the said Government would release him.

On an application for a writ of habeas corpus directed to the Secretary of State :—

Held (1.) that reg. 14 B was inconsistent with the Irish Free State Constitution Act, 1922, and impliedly repealed by it, and that the order of internment was consequently bad ;

(2.) that, notwithstanding that the Secretary of State had by surrendering the applicant to the Free State Government lost the legal control of his body, the application was properly made against him, as there was sufficient doubt whether he had not in view of his agreement with that Government enough de facto control to justify the issue of the writ, so that the question of control might be definitely determined on the return.

Barnardo v. *Ford* [1892] A. C. 326 followed.

APPEAL from the refusal of a Divisional Court to grant a rule for the issue of a writ of habeas corpus.

Before March 7, 1923, the Home Secretary had received information that there existed in England a dangerous and widespread organization which was acting in conjunction with an armed force in Ireland in rebellion against the Irish Free State, and which had for its purpose the overthrow of the existing Governments both in Southern and Northern Ireland, and, in addition to rendering assistance to such armed forces, the purpose of such organization included acts of violence in England. He had further received information which led him to the conclusion that the applicant, Art O'Brien, was one of the ringleaders of that organization. Under those circumstances the Home Secretary, purporting to act under the authority of reg. 14 B of the Restoration of Order in Ireland Regulations, 1920, made on March 7, 1923, the following order : " Whereas on the recommendation of a competent military authority it appears to me that for securing the restoration or maintenance of order in Ireland it is expedient that Mr. Art O'Brien of 37 St. James' Place, London, S.W.; 11 Whitehall Park, Highgate; and Flat No. 7, 57 Drayton Gardens, South Kensington, should in view of

the fact that he is a person suspected of acting, having acted, or being about to act in a manner prejudicial to the restoration and maintenance of order in Ireland be subjected to such obligations and restrictions as are hereinafter mentioned, Now I hereby order that the said Mr. Art O'Brien shall be interned in the Irish Free State in such place as the Irish Free State Government may determine, and shall be subject to all rules and conditions applicable to persons there interned and shall remain there until further order. If within seven days of the date when this order is served on the said Mr. Art O'Brien he shall submit to me any representations against the provisions of this order, such representations will be referred to an advisory committee appointed for the purpose of the above mentioned regulation and presided over by a person who holds or has held high judicial office and will be duly considered by the committee. If I am satisfied by the report of the said committee that this order may be revoked or varied without injury to the restoration and maintenance of order in Ireland I will revoke or vary this order by a further order in writing under my hand. Failing such revocation or variation this order shall remain in force."

On March 11 the said O'Brien was arrested in London and taken to Mountjoy Prison in Dublin, where he was detained in custody. On April 10 O'Brien applied to a Divisional Court for a rule nisi for a writ of habeas corpus directed to the Home Secretary. In his affidavit in support of the application O'Brien deposed as follows: He was born in England and had permanently resided in England for over twenty years. He had never resided permanently in Ireland. He was an engineer by profession and carried on business as such in England up to the year 1919. Since then he had been associated with a publishing business in London and had carried out his duties as the representative in London of the Irish Republican Government. On March 11, 1923, he was arrested at 57 Drayton Gardens and taken to a police station. He was then taken to Liverpool, put on board a British warship, and conveyed to Dublin, where

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he was interned in Mountjoy Prison. He submitted: (1.) that the Restoration of Order in Ireland Regulations were abrogated by virtue of the passing of the Irish Free State Constitution Act, 1922, and afforded no justification for the making of the order under which he was arrested and interned; (2.) that the order was not made in accordance with the regulation under which it purported to be made in that it did not specify the place where he was to be interned, and in that the Secretary of State had no power to delegate to any other authority or person the right and duty to specify such place; and (3.) that from statements appearing in the Official Report of the proceedings in the House of Commons on March 19, 1923, the Secretary of State must be in a position by agreement with the Government of the so-called Irish Free State to cause him to be returned to England. The statements referred to are in vol. 161, cols. 2248–50. Mr. Bridgeman said: "In my opinion the Government has not lost control." . . . . "The Free State have undertaken certain other things. First of all, that if other proceedings were desired by them against these deportees, they are only to be taken, not only after consultation, but after the consent has been received of the British Government." . . . . "The second undertaking given is that the internees should have every facility for a personal hearing before the Advisory Committee. The third is that if the Advisory Committee decide that any person should not have been deported he will be released."

The affidavit of the Home Secretary in reply in para. 5 repeated the statements that he made in the House of Commons set out above as to the undertakings given by the Irish Free State with reference to the deportees, and in para. 6 he said: "As appears from the affidavit of the said Art O'Brien the said Art O'Brien is now in Mountjoy Prison, Dublin, and he is in the custody and control of the said Governor of the said prison. The said Governor is an official of the Free State Government and is not subject to the orders or directions of myself or the British Government."

The Divisional Court (Lord Hewart C.J., Avory and

Roche JJ.) refused the rule. On April 13 O'Brien applied to the Court of Appeal, who granted a rule nisi.

By the Restoration of Order in Ireland Act, 1920 (10 & 11 Geo. 5, c. 31), s. 1, sub-s. 1, His Majesty in Council was empowered to issue regulations under the Defence of the Realm Consolidation Act, 1914, for securing the restoration and maintenance of order in Ireland, and by sub-s. 4: "Any such regulations may apply either generally to the whole of Ireland or to any part thereof . . . . and shall have effect as if enacted in this Act."

By reg. 14 B made under the powers of that Act: "Where on the recommendation of a competent naval or military authority or of one of the advisory committees hereinafter mentioned it appears to the Secretary of State that for securing the restoration or maintenance of order in Ireland it is expedient that a person who is suspected of acting or having acted or being about to act in a manner prejudicial to the restoration or maintenance of order in Ireland shall be subjected to such obligations and restrictions as are hereinafter mentioned, the Secretary of State may by order require that person forthwith, or from time to time, either to remain in, or to proceed to and reside in, such place as may be specified in the order." . . . . "Any person interned under such order shall be subject to the like restrictions and may be dealt with in like manner as a prisoner of war, except so far as the Secretary of State may modify such restrictions." . . . . "The advisory committees for the purposes of this regulation shall be such advisory committees as are appointed for the purpose of advising the Secretary of State with respect to the internment and deportation of aliens, or any committee specially appointed by the Secretary of State for the purposes of this regulation, each of such committees being presided over by a person who holds or has held high judicial office." "In the application of this regulation to Scotland or Ireland references to the Secretary for Scotland and references to the Lord Lieutenant or Chief Secretary shall respectively be substituted for references to the Secretary of State, but an

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order under this regulation may require the person to whom the order relates to reside or to be interned in any place in the British Islands."

On March 31, 1922, the Irish Free State (Agreement) Act (12 Geo. 5, c. 4) was passed, by which it was provided that the articles of agreement for a treaty between Great Britain and Ireland set forth in the Schedule thereto should have the force of law from the date of the passing of the Act. Of those articles of agreement the two first are as follows :—

1. "Ireland shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa, with a Parliament having powers to make laws for the peace order and good government of Ireland and an Executive responsible to that Parliament, and shall be styled and known as the Irish Free State."

2. "Subject to the provisions hereinafter set out the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State."

On December 5, 1922, the Irish Free State Constitution Act (13 Geo. 5, Sess. 2, c. 1) was passed, which recited a Constituent Act of Dail Eireann and declared that the Constitution set forth in the First Schedule to the said Constituent Act should be the Constitution of the Irish Free State. The Constituent Act provided that the said Constitution should be construed with reference to the articles of agreement for a treaty above mentioned.

The articles of the Constitution which are material to the present case are :—

Art. 1 : "The Irish Free State . . . . is a co-equal member of the Community of Nations forming the British Commonwealth of Nations."

Art. 2: "All powers of government and all authority legislative, executive, and judicial in Ireland, are derived from the people of Ireland, and the same shall be exercised in the Irish Free State through the organizations established by or under, and in accord with, this Constitution."

Art. 6: "The liberty of the person is inviolable, and no person shall be deprived of his liberty except in accordance with law. Upon complaint made by or on behalf of any person that he is being unlawfully detained, the High Court and any and every judge thereof shall forthwith enquire into the same and may make an order requiring the person in whose custody such person shall be detained to produce the body of the person so detained before such Court or judge without delay and to certify in writing as to the cause of the detention and such Court or judge shall thereupon order the release of such person unless satisfied that he is being detained in accordance with the law."

Art. 51: "The Executive Authority of the Irish Free State is hereby declared to be vested in the King, and shall be exercisable, in accordance with the law, practice, and constitutional usage governing the exercise of the Executive Authority in the case of the Dominion of Canada, by the representative of the Crown. There shall be a Council to aid and advise in the government of the Irish Free State to be styled the Executive Council. The Executive Council shall be responsible to the Dail Eireann, and shall consist of not more than seven nor less than five Ministers appointed by the Representative of the Crown on the nomination of the President of the Executive Council."

Art. 73: "Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas (Parliament of the Irish Free State)."

By the Irish Free State (Consequential Provisions) Act (13 Geo. 5, Sess. 2, c. 2), passed on the same day, it was

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provided s. 6, sub-s. 1 "His Majesty may by Order in Council (*a*) make such adaptations of any enactments so far as they relate to any of His Majesty's Dominions other than the Irish Free State as may appear to him necessary or proper as a consequence of the establishment of the Irish Free State . . . . and any such Order in Council may contain such supplemental, consequential, and incidental provisions as may appear necessary or proper for the purposes of the Order, and any such Order shall, subject to revocation or alteration by a subsequent Order, have effect as if enacted in this Act." Sect. 7, sub-s. 1 "It shall be lawful for any department of the British Government to make arrangements with any Minister of the Government of the Irish Free State whereunder any of the powers and duties of the Minister may be exercised and performed on his behalf by officers of that department, or whereunder any of the powers and duties of that department may be exercised and performed on behalf of that department by officers of the Minister, on such terms and conditions as may be agreed."

Subsequently to the date of the applicant's arrest and deportation and of the hearing of the application to the Divisional Court an Order in Council was made on March 27, 1923, under s. 6 of the last-mentioned Act, by clause 2 of which it was provided that: "Subject to the provisions of this Order and of any subsequent Order in Council made under s. 6 of the Irish Free State (Consequential Provisions) Act, 1922, references in any enactment passed before the establishment of the Irish Free State to 'the United Kingdom' or 'the United Kingdom of Great Britain and Ireland' or 'Great Britain and Ireland' or 'Great Britain or Ireland' or 'the British Islands' or 'Ireland' shall, in the application of the enactment to any part of Great Britain and Ireland other than the Irish Free State, be construed as exclusive of the Irish Free State, except that in the Acts mentioned in the Schedule to this Order any such expression as aforesaid shall, to the extent specified in that Schedule, be construed as including the Irish Free State." Among the Acts mentioned in the Schedule is the Interpretation Act, 1889, the "extent

specified" in relation to which Act is "The definition of British Islands in s. 18 so far as that section applies to the interpretation of any Act passed after the establishment of the Irish Free State" and the Restoration of Order in Ireland Act, 1920, the extent specified being "s. 1 (1.) and (4.)."

Pending the hearing before the Court of Appeal a further Order in Council was made on April 21 which provided by clause 2 that: "The reference to the Restoration of Order in Ireland Act, 1920, s. 1 (1.) and (4.) in the Schedule (to the Order of March 27) shall be construed as extending to and shall include the regulations made in pursuance of the said Act."

Sir Douglas Hogg A.-G. and *Giveen* showed cause against the rule. This application is misconceived, the writ is addressed to the wrong person, and the application is made to the wrong court. The writ should be directed to the person who has the control of the applicant's body, who in this case is the Governor of Mountjoy Prison, an official of the Irish Free State Government who is not subject to the directions of the British Government. The Home Secretary has no control over the applicant except so far as it is given by an agreement entered into between the British Government and the Free State whereby the Free State undertook that if the Advisory Committee decided that any person should not have been deported he would be released: Officia Report, vol. 161, cols. 2251–52, and that agreement is not enforceable in any Court of law. The fact that the Home Secretary ordered the arrest does not make him a proper person to whom to direct the writ. The Court cannot issue a writ against a person who once had but has ceased to have the control. It is the fact of the detention and nothing else that gives the Court jurisdiction: *Barnardo* v. *Ford.* (1) Even where the defendant has parted with the control to avoid compliance with the demand for surrender the proper remedy is not an application for a writ of habeas corpus but for committal for contempt of Court. In the next place

(1) [1892] A. C. 326.

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the application is to the wrong Court. It should have been made to the Irish Court under art. 6 of the Free State Constitution. The application to this Court is an attempt to get round the Habeas Corpus Act, 1862 (25 & 26 Vict. c. 20), which enacted that: "No writ of habeas corpus shall issue out of England by authority of any judge or Court of justice therein into any colony or foreign dominion of the Crown where His Majesty has a lawfully established Court or Courts of justice having authority to grant and issue the said writ." The Free State is a colony within the meaning of that Act.

The objections taken by the applicant to the internment order cannot be supported. It is said that even if the order would have been valid before 1922 it was incapable of being lawfully made after the establishment of the Irish Free State. Now it could not be disputed in this Court that it would have been valid before that State came into being. In *Ex parte Brady* (1) it was held by a majority of the Court of Appeal that this reg. 14 B applied to a suspected person who was resident in England as well as to a person resident in Ireland. There an internment order was made by the Home Secretary in June, 1921, for the internment of the applicant, who was then residing in Cheshire, at Ballykinlar in Ireland, and the order was held valid. But it is said that reg. 14 B is inconsistent with the Free State Constitution Act, which provides for an independent executive, and is therefore impliedly repealed thereby. The maintenance of the power of internment under that regulation is not necessarily inconsistent with the creation of a new executive in the Free State. The British Government have an interest in the maintenance of order in Ireland, and it was not intended by the Act of 1922 to take away from them the right to assist in maintaining that order. The fact that the Free State is no longer governed by the British Cabinet is a material factor for the Home Secretary to consider when selecting a place of internment, but cannot deprive him of a power that was given him by statute. Then if reg. 14 B still stands it empowers internment

(1) (1921) 91 L. J. (K. B.) 98.

in the Free State, for it expressly provides that the suspected person may be "interned in any place in the British Islands." The effect of the Irish Free State (Consequential Provisions) Act, coupled with the Orders in Council of March 27 and April 21, 1923, is that the expression "British Islands" in the regulation is to be read as including the Free State. Sect. 6, sub-s. 1, of that Act provides that any Order in Council made under it is to "have effect as if enacted in this Act." Then the Order in Council of March 27 says in clause 2 that in the Acts mentioned in the Schedule "British Islands" shall "be construed as including the Irish Free State," and amongst the Acts in the Schedule is the Restoration of Order in Ireland Act, 1920, s. 1, sub-ss. 1 and 4, of which sub-s. 1 deals with the power to make regulations for the restoration of order, and sub-s. 4 says that such regulations may apply "to the whole of Ireland or to any part thereof." And to make the matter clearer the Order in Council dated April 21, 1923, says that the reference to the Restoration of Order in Ireland Act, 1920, in the Schedule to the former Order is to be construed as including the regulations made in pursuance of that Act. The applicant further objects that even if there was power to order his internment in Ireland this particular order was bad in form, for it does specify the place where he is to be interned. It is however sufficiently precise to satisfy the regulation. The expression "internment" merely means keeping within a defined area, and that area may be large, it may be co-extensive with a country. It is an expression used in connection with armies. In 1871 parts of the French Army were interned in Switzerland.

Patrick Hastings K.C., *St. John Field* and *R. O'Sullivan* in support of the rule. Although the correctness of the decision in *Ex parte Brady* (1) may be questioned in a higher Court it must be conceded here that before 1922 there would have been power to deport the applicant to Ireland. But that power is gone. Reg. 14 B is inconsistent with the Irish Free State Constitution Act, and must be treated as impliedly

(1) 91 L. J. (K. B.) 98.

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repealed. In the first place it is a condition of making the order of internment that the Secretary of State should have acted upon the recommendation of a competent naval or military authority or of an advisory committee, but the British Cabinet has no longer any naval or military authority in the Free State nor any advisory committee which by reason of residence there has a special knowledge of Irish affairs. Then it empowers the Secretary of State to require the internee to remain in such place and to comply with such directions and restrictions as may be specified in the order. But the Home Secretary has no longer any power so to require if the place of internment is in the Free State, for the executive authority is now vested in the Free State Government. Secondly, the order itself is bad in form, for it does not specify the place of internment. The Home Secretary has no power to delegate the selection of the particular place to the Free State Government. In *Ex parte Brady* (1) a precise place was specified in the order, Ballykinlar. But even assuming that reg. 14 B was still in other respects operative, the place of internment authorized by the regulation is limited to the "British Islands." Now "British Islands" is defined by the Interpretation Act, 1889, to mean "the United Kingdom, the Channel Islands, and the Isle of Man." But there is no longer any United Kingdom, for the union of Great Britain and Ireland has come to an end, and for it has been substituted a treaty between two independent countries. It was to meet that difficulty that the two Orders in Council of March 27 and April 21 were made. The former of those Orders was made a month after the internment of the applicant, and therefore unless it was retrospective it could not justify the internment. It was contended by the Attorney-General that it derived a retrospective operation from the provision of s. 6, sub-s. 1, of the Free State (Consequential Provisions) Act that the order when made should "have effect as if enacted in this Act." But as was said by Wright J. in *In re Athlumney* (2) "No rule of construction

(1) 91 L. J. (K. B.) 98. (2) [1898] 2 Q. B. 547, 551.

is more firmly established than this: that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation . . . . unless that effect cannot be avoided without doing violence to the language of the enactment," and in the present case no violence to the language is necessary to avoid giving the Order a retrospective effect. On the point that the writ is wrongly directed to the Home Secretary as a person not having the control of the applicant it is enough to refer to his admission in the House of Commons that he had agreed with the Free State Government for the return of the deportee if his internment should be held to be unauthorized, and to point out that in view of that admission the question whether he has in fact sufficient control is one which can only be determined on the return to the writ: *Barnardo* v. *Ford.* (1)

Cur. adv. vult.

May 9. The following written judgments were delivered:—

BANKES L.J. On March 7 of the present year an order was made by the Home Secretary directing the internment of the applicant. The order purports to have been made under reg. 14 B of the Restoration of Order in Ireland Regulations, and is in the following terms: [His Lordship read the order.] On March 11 the applicant was arrested at his house in London and was conveyed in custody to Dublin and placed in the Mountjoy Prison in that city, where he now is. It does not appear by what authority the arrest and conveyance to Dublin were made. The applicant states in his affidavit that when arrested he was informed by the police officers that the arrest was upon a warrant issued by the Home Secretary. The Home Secretary in his affidavit says that the applicant was under the order of internment conveyed to Ireland. It is not material to inquire into this part of the history, because the applicant's complaint is confined to the order itself on the ground that it is illegal and is not warranted by the regulation under which

(1) [1892] A. C. 326.

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it purports to have been made. Application was made to a Divisional Court for an order nisi calling upon the Home Secretary to show cause why a writ of habeas corpus should not issue directed to him to have the body of the applicant before the Court. The Court refused to grant a rule and application was then made ex parte to this Court under Order LVIII., r. 10, by way of appeal from that decision. It appeared to this Court desirable that the case should be fully argued, and a rule nisi was granted against which the Attorney-General has appeared to show cause. Under these circumstances the Court has had the advantage of hearing a full argument on both sides. In order to make the position clear it is necessary to call attention to the circumstances under which reg. 14 B came to be applicable to Ireland. The regulation as originally framed was a wartime production made under the powers conferred by the Defence of the Realm Consolidation Act, 1914, and directed against persons of hostile origin or association, and it was gradually built up by a series of amendments introduced from time to time between June, 1915, and April, 1918. But for the passing of the Restoration of Order in Ireland Act, 1920, the regulation would have expired, but by that Act power was conferred upon His Majesty in Council to issue regulations under the Defence of the Realm Consolidation Act, 1914, for securing the restoration and maintenance of order in Ireland. By sub-s. 4 of s. 1 it is provided that regulations so made shall have effect as if enacted in the Act itself. Acting upon the powers conferred by this statute an Order in Council was made on August 13, 1920, applying to Ireland (inter alia) the original reg. 14 B as modified by the provisions contained in the First Schedule to the Order. It is under this regulation that the order under which the applicant is interned was made. Both the original regulation and the regulation as applied to Ireland have come under review in this Court. In *Rex* v. *Halliday* (1) this Court, and afterwards the House of Lords, held that the original reg. 14 B in spite of the far-reaching and autocratic power which it conferred upon the

(1) [1916] 1 K. B. 738; [1917] A. C. 260.

executive in restraint of personal liberty was authorized by the Defence of the Realm Consolidation Act, 1914, and was not ultra vires. In *Brady's Case* (1) this Court by a majority held that the modified regulation was not confined in its application to Ireland only, but was sufficiently wide in its terms to justify an order made by the Home Secretary for the internment in Ireland of a man at the date of the order residing in England. That case was decided in July, 1921.

The questions for decision in the present case may be divided under three heads: (1.) Whether since the establishment of the Irish Free State an order can be lawfully made by the Home Secretary for the internment in that State of a person at the date of the order residing in England? (2.) Whether, assuming that such an order can lawfully be made, the order now complained of is in form a compliance with the regulation? (3.) Whether the application for a writ of habeas corpus directed to the Home Secretary is the proper procedure under the circumstances of the case? It is inconceivable that the order for the internment of the applicant could have been made by the Home Secretary unless he had before him information which in his opinion not only justified, but required, the making of the order; presumably also in a matter of this importance he acted upon advice as to his powers. It is a matter of regret therefore that the Court should have been called upon to consider the legality of his action. The Court knows nothing of the facts upon which the Home Secretary acted, and even if it did it could have no right to be influenced by them. The duty of the Court is clear. The liberty of a subject is in question. The Court must inquire, and inquire closely, into the question whether the order of internment complained of was or was not lawfully made. In making that inquiry it is I think convenient to consider first of all the material changes in the relations between England and Southern Ireland which were brought about by the Irish Free State Constitution Act, 1922 (12 & 13 Geo. 5, Sess. 2, c. 1). By that statute the Constitution as

(1) 91 L. J. (K. B.) 98.

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settled by an Act passed by the House of Parliament constituted pursuant to the Irish Free State (Agreement) Act, 1922 (12 Geo. 5, c. 4), as a Constituent Assembly, was adopted as the Constitution of the Irish Free State. The Constitution as contained in that Act has to be construed with reference to the articles of agreement for a treaty between Great Britain and Ireland set forth in the Schedule to that Act and which are by the Act given the force of law. The first and second articles of agreement are as follows: [His Lordship read the articles.] Then arts. 1, 2, 51 and 73 of the Constitution provide as follows: [He read them.] It is quite clear from these provisions that the Executive of the Irish Free State is an Executive distinct from and independent of the Executive in England, just as distinct and just as independent as the Executive of the Dominion of Canada is from the Executive of England. It is also clear that the Irish Free State is (as is indicated in reference to statutory provisions by the definition of "Colony" in s. 18 of the Interpretation Act of 1889) just as much a colony as is Canada itself. One result of this state of things is that no writ of habeas corpus can issue out of England by authority of any judge or Court of justice therein into the Irish Free State. This is the effect of the Habeas Corpus Act, 1862, which was passed as a result of the decision in *Ex parte Anderson.* (1) If I am right in thinking that for the present purpose the Irish Free State can properly be compared with the Dominion of Canada, then a forcible way of testing the validity of the order for the internment of the applicant is to ask the question, Could the Home Secretary have made an order for his internment in Canada, and if not, then why not? The answer appears to me to be supplied partly from a necessary implication from the nature of the power conferred by the regulation and partly from the expressed language of the regulation itself. The regulation confers upon a branch of the Executive in England certain absolute powers, and among them the absolute power of interning persons without trial, and without informing them of the

(1) (1861) 3 E. & E. 487.

details of the charge made against them, or of the evidence upon which it is made, and for an unlimited period. The regulation is silent in reference to any power of discharge or release, but it is obvious that such a power must be implied. In whom is the implied power vested? Obviously, as it seems to me, in the branch of the Executive by whom the power to intern was exercised. The form of the order in the present case is apparently framed on this view of the regulation, as the applicant is directed to remain interned "until further orders." Whose orders can these be except the orders of the authority who directed the internment? I arrive at the same conclusion from a consideration of the wording of the regulation. In reference to an interned person the regulation provides that "any person interned under such Order shall be subject to the like restrictions and may be dealt with in like manner as a prisoner of war except so far as the Secretary of State may modify such restrictions, and if any person so interned escapes or attempts to escape from the place of internment, or commits any breach of the Rules in force therein, he shall be guilty of an offence against these Regulations." I confess to a difficulty in attaching any definite meaning to so much of this regulation as refers to the manner in which a prisoner of war may be dealt with. It must I think refer to the manner in which a prisoner of war is dealt with in the country the Executive of which makes the order of internment. The same may I think be said in reference to the offences referred to in the regulation. If proper to be dealt with summarily, they are offences to be dealt with by the Courts of summary jurisdiction of the country the Executive of which makes the order of internment. There can be no possible doubt as to the modification of restrictions, as the regulation provides that they can only be modified by the Secretary of State. These provisions to my mind point irresistibly to the conclusion that since the establishment of the Irish Free State an order cannot lawfully be made by the Home Secretary for the internment of a person in the Irish Free State. The reasons appear to me to be these. In the first place because the order deprives the

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Executive of this country of that full and uncontrolled right to direct the release of the interned person which in my opinion is a necessary incident of a valid order of internment under the regulation; secondly, because the effect of the order is to subject the interned person to restrictions other than those indicated in the regulation and to restrictions which the Secretary of State has no power to modify; and, thirdly, because the interned person is deprived of the particular form of trial which is prescribed by the regulations in the event of his committing any of the offences indicated in the regulation. The view which I have just expressed as to the construction and effect of the regulation is strongly borne out by that part of the regulation which expressly provides that an order under the regulation may require the person to whom the order relates to reside or to be interned in any place in the British Islands. The fact that in August, 1920, when this regulation was made it was thought necessary to make such a provision is I consider a powerful argument in support of the contention of the applicant in the present case.

At this point it is necessary to consider how far this particular provision of the regulation relating to an order of internment in the British Islands has been modified by subsequent legislation. The Irish Free State (Consequential Provisions) Act, 1922 (12 & 13 Geo. 5, Sess. 2, c. 2), passed on the same date as the Irish Free State Constitution Act, gave power to His Majesty by Order in Council to make such adaptations of any enactments as appeared to be necessary or proper as a consequence of the establishment of the Irish Free State, and provided that any order so made should have effect as if enacted in that Act. The Act was passed on December 5, 1922. The first Order made under the Act is dated March 27, 1923. By clause 2 of that Order it was for the first time declared that the expression "British Islands" appearing in any enactment passed before the establishment of the Irish Free State should be construed as exclusive of the Irish Free State. It follows, therefore, that at the date of the order of internment, and at the date of the applicant's arrest, no statutory alteration of the

expression "British Islands" in reg. 14 B had been made, though it was made before the application was made to the Divisional Court for a writ of habeas corpus. I mention this fact merely to show that I have not overlooked it. It is, in my opinion, of no material importance, for a technical as well as for a substantial reason. The technical reason is that the Irish Free State (Consequential Provisions) Act provides that the order of March 27, 1923, is to have effect as if enacted in the Act itself. This Act received the Royal Assent on December 5, 1922. The substantial reason is that after the establishment of the Irish Free State reg. 14 B became, in my opinion, quite inconsistent with the constitution of that State, and consequently under art. 73, which I have already quoted, it ceased to have the force of law in the Free State, and for the reasons which I have already given no order for internment in the Irish Free State could in my opinion be made which would comply with the requirements of the regulation. In the view I take of the language of the regulation and of the extent of the power conferred by it it is unnecessary to decide the question whether for any order for internment in Ireland the regulation required the approval of the Lord-Lieutenant or Chief Secretary, or whether to constitute a valid order the place of internment must be named in the order, and I express no opinion on those points, although in reference to the latter I do see that unless the place is named the person affected by the order is placed in a difficulty if he desires immediately to question the validity of the order by means of an application for a writ of habeas corpus directed to the person in whose custody he is placed. During the argument reference was made to two Orders in Council both made after the internment of the applicant, which were said to have some bearing upon the question before the Court, though I did not understand the Attorney-General as relying upon them in support of the order of internment. The first Order was the one made on March 27, to which I have already referred. The second was made on April 21 of the present year. Both purport to have been made under the powers conferred by s. 6, sub-s. 1, of the Irish Free State

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(Consequential Provisions) Act, 1922, upon His Majesty in Council to "make such adaptations of any enactments so far as they relate to any of His Majesty's Dominions other than the Irish Free State as may appear to him to be necessary or proper as a consequence of the establishment of the Irish Free State." By the Order of March 27, 1923, provision is made in para. 2 for the exclusion of the Irish Free State with certain exceptions from the operation of enactments passed before the establishment of that State which contain references to "The United Kingdom," the "United Kingdom of Great Britain and Ireland," "Great Britain and Ireland," "Great Britain or Ireland," "The British Islands" or "Ireland." The exceptions are the Acts mentioned in the Schedule to the Order to the extent specified in the Schedule. The only two of these expressions to which reference need be made are "Ireland," which is found in the Restoration of Order in Ireland Act, 1920, and "The British Islands," which is found in reg. 14 B. I have already to some extent dealt with the latter, but so far as the Schedule is concerned the only reference to British Islands in the Schedule is what amounts to an instruction to the draftsman of the future that in any Act passed after the establishment of the Irish Free State the use of the expression "British Islands" will include the Irish Free State. This provision has no reference to the question now under discussion. The only material provision in the Schedule is that s. 1, sub-ss. 1 and 4, are to apply to the Irish Free State. Those sub-sections are the ones under which His Majesty in Council was authorized to issue regulations for the restoration and maintenance of order in Ireland. Assuming, but without deciding, that the Order of March 27 is intra vires in this respect, it is sufficient for the present purpose to say that no new regulations have been issued under this Order. The last Order of April 21 is remarkable not only because of the date at which it is issued, but also because of what it purports to do. In effect it provides that all the regulations made on August 13, 1920, including 14 B are to apply to the Irish Free State. Again, assuming,

but without deciding, that this Order is intra vires, all I need say about it is that if I am right in my view that having regard to the terms of reg. 14 B it is not possible for the Home Secretary to make a lawful order under it for the internment of the applicant in the Irish Free State it does not help matters to provide that the regulation shall be construed as including the Irish Free State.

The last point for consideration is whether a writ ought to be issued directed to the Home Secretary having regard to the contention of the Attorney-General, which was accepted by the Divisional Court, that as the applicant had been deported to and was interned in the Irish Free State the Home Secretary had no longer any power or control over him except in so far as the Government of that State had agreed that, in the event of the advisory committee deciding that he ought not to have been deported and interned, they could release him. From the statements made in the House of Commons to which we have been referred it would appear that the Home Secretary was at the time he made those statements under the impression that he had not lost control over the persons who by his orders had been interned in the Irish Free State. In his affidavit he states that the Governor of the Mountjoy Prison is an official of the Free State Government, and is not subject either to his orders or to those of the British Government. This is no doubt an accurate statement in reference to the Governor of the prison, but it leaves the question in doubt how far, if at all, by arrangement with the Free State Government the body of the applicant is under the control of the Home Secretary. This question cannot, I think, be satisfactorily disposed of unless the rule is made absolute which will give the Home Secretary the opportunity, if he desires to take advantage of it, of making the position clearer than at present it appears to be. This was the course taken in *Barnardo* v. *Ford* (1), and is, in my opinion, the appropriate course to take in the present case. The order, therefore, is made absolute.

In conclusion it may not be out of place to observe upon the

(1) [1892] A. C. 326.

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practice of legislation by means of Orders in Council that, though the practice may be a convenience to Parliament, it is one which leads to inconveniences and difficulties and dangers of which the present case is only one example. Laws are made the drafting of which has never been subjected to criticism in Parliament, and when made they are not included in the Statute Book. The result is that in the first place they are difficult to find, and when found they are more often than not difficult of interpretation, whether it be by a lawyer who is called upon to interpret them, or by a Minister of the Crown whose duty it is to administer them.

SCRUTTON L.J. This appeal raises questions of great importance regarding the liberty of the subject, a matter on which English law is anxiously careful, and which English judges are keen to uphold. As Lord Herschell says in *Cox* v. *Hakes* (1): "The law of this country has been very jealous of any infringement of personal liberty." This care is not to be exercised less vigilantly, because the subject whose liberty is in question may not be particularly meritorious. It is indeed one test of belief in principles if you apply them to cases with which you have no sympathy at all. You really believe in freedom of speech, if you are willing to allow it to men whose opinions seem to you wrong and even dangerous; and the subject is entitled only to be deprived of his liberty by due process of law, although that due process if taken will probably send him to prison. A man undoubtedly guilty of murder must yet be released if due forms of law have not been followed in his conviction. It is quite possible, even probable, that the subject in this case is guilty of high treason; he is still entitled only to be deprived of his liberty by due process of law.

The applicant for the writ of habeas corpus here is one O'Brien, describing himself as "the representative in London of the Irish Republican Government," an undoubtedly illegal body. His complaint is that being permanently resident in England he was arrested by police officers at his house in

(1) (1890) 15 App. Cas. 506, 527.

London and taken the same day to Liverpool and Dublin, where he was confined in Mountjoy Prison. He has now been in that prison for nearly two months; he has not been brought before any Court for trial, and it is apparently not the intention of those who hold him to bring him before any Court. He has not been informed of the evidence on which an order was made for his arrest, but is offered an opportunity of appearing before a committee meeting in private but presided over by an eminent ex-judge. He is apparently imprisoned without trial for a sentence of indefinite duration, and the Home Secretary who ordered his arrest and deportation to Ireland states to the Court by his counsel, the Attorney-General, that the Home Secretary cannot release him. Before the war it is almost impossible to conceive that such a state of things could exist in England. That the law is alleged to justify it now is a position that requires the most vigilant scrutiny by the Courts, for it is interesting to note that s. 11 of the Habeas Corpus Act of 1679 condemns the sending of inhabitants or residents of England as prisoners for criminal matters into Ireland with the severest penalties.

The case depends on the true meaning and continuing validity of reg. 14 B of the regulations issued on August 13, 1920, by Order in Council made under the Restoration of Order in Ireland Act, 1920. The first question which the applicant desires to argue is whether that Act authorized the making of any regulations applicable to England, or was confined to regulations applicable to Ireland. But he agrees that in this Court he is bound to assume that regulations can be made affecting England, by reason of the decision in *Ex parte Brady*. (1) I dissented in that case, and further consideration has only confirmed my private opinion that I was right for the reasons therein stated, but of course I am bound by that decision, and deal with the present case on the assumption that there was statutory authority to make regulations applicable to England. No other point was argued or decided in *Ex parte Brady*. (1) Under that Act an Order in Council was issued on August 13,

(1) 91 L. J. (K. B.) 98.

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1920. Under the Defence of the Realm Act during the war a large number of regulations called the Defence of the Realm Regulations had been issued dealing with an enormous variety of matters affecting the defence and safety of the realm in time of war. The procedure adopted under the Restoration of Order in Ireland Act, 1920, was to enact by Order in Council for England and Ireland nearly the whole of the Defence of the Realm Regulations "having effect in Ireland on August 13, 1920," with a few omissions and alterations. There appears to have been no careful consideration of which of these regulations were concerned with the restoration of order in Ireland, especially as far as this application to England was concerned, otherwise it is difficult to understand why in 1920 it was desirable for the restoration of order in Ireland to regulate the cultivation of hops in England (reg. 2 N N), or the keeping of pigs in England (reg. 2 N), or the capture for food of migrating birds or rabbits in England (reg. 2 R), or to limit English season tickets (reg. 7 B), or to forbid persons in England to have in their possession more silver coinage than they reasonably required (reg. 30 E E), or to provide for the discipline in England of the marine and military forces of His Majesty's Allies (reg. 45 F), and these are only a few of the regulations which are excellent for the defence of the realm in time of foreign war, but yet have nothing to do with the maintenance of law and order in Ireland. Why these regulations were ever enacted in this lazy and unintelligent way I do not understand.

The material regulation here is 14 B in a section headed "Control of Movements of Civil Population." This regulation itself suffers from the careless drafting of the rest of the Order; for the second paragraph copied from the Defence of the Realm Regulations, and relating to the control of aliens in the United Kingdom to secure the safety of a British subject in foreign parts, seems to have nothing to do with the restoration of law and order in Ireland, and to have got in by an oversight. Reg. 14 B gives power to certain authorities (inter alia) to intern in a place in the British Islands specified in the Order any person suspected of acting or having acted

or being about to act in a manner prejudicial to the restoration or maintenance of law and order in Ireland, and provides that during internment he shall be subject to the like restrictions and may be dealt with in like manner as a prisoner of war, except so far as the Secretary of State may modify such restrictions. This regulation could on the authority of *Rex* v. *Halliday* (1) be properly made under the Defence of the Realm Consolidation Act, 1914, and therefore under the Restoration of Order in Ireland Act, 1920, as explained in *Brady's Case* (2), at the time it was made.

The first question on this as it stood before the Irish Free State Constitution Act of 1922 appears to me to be: "What official is authorized to make an order to arrest a person in one part of the United Kingdom and intern him in another?" The answer appears to me to be supplied by the last paragraph but one of the regulation: "In the application of this regulation to Scotland and Ireland references to the Secretary for Scotland, and references to the Lord Lieutenant or Chief Secretary, shall respectively be substituted for references to the Secretary of State, but an order under this regulation may require the person to whom the order relates to reside or to be interned in any place in the British Islands." I interpret this as meaning that the person to make an order under the regulation applying or relating to a particular part of the British Islands must be that high official who is in charge and control of that part. For instance an order applying or relating to Scotland only must be made by the Secretary for Scotland and cannot be made by a Secretary of State, whose jurisdiction is limited to England. In my view it follows from this that an order applying to and to take effect in two jurisdictions must be made by the two Secretaries each for his jurisdiction. If the Secretary for Scotland desires to arrest in Scotland and intern in England the latter part of the order must be made by the Secretary of State, who alone can intern in England. This natural division of power is recognized in other parts of the regulations. For instance in reg. 55 A 3 the powers as to an area situated partly in

(1) [1917] A. C. 260. (2) 91 L. J. (K. B.) 98.

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England and partly in Scotland are to be exercised jointly by a Secretary of State and the Secretary for Scotland. In reg. 51, the chief officer of police must before ordering suspicious things seized by him to be destroyed obtain the consent of "a Secretary of State, the Secretary for Scotland, or the Chief Secretary in Ireland as the case may be." How "the case may be" will be determined by the jurisdiction over the place where the search and seizure is effected; and if in Ireland must be the consent of the Chief Secretary.

The result of this is that before the Irish Free State Constitution Act, 1922, an order to arrest in England and intern in Ireland must be made as to England by a Secretary of State, as to Ireland by the Chief Secretary, and if made only by the Secretary of State would not be justified by the regulation. Nor would an arrest in England for the purpose of an internment not justified by the regulation be within the power of a Secretary of State. He could not arrest in England to intern in France. The Secretary for Scotland could not order internment in England; that must be the order of a Secretary of State. In my view the regulations only justified internment in places where the person ordering internment could control the internment, its conditions and its determination.

The next step is the effect of the Irish Free State Constitution Act, 1922. That Act ratified a treaty made between certain members of His Majesty's Government and certain Irishmen, and gave effect to a Constitution framed by certain persons purporting to represent Southern Ireland or the Irish Free State. Art. 73 of the Constitution provided that the laws in force in the Irish Free State at the date of the Constitution coming into operation should remain in force (1.) to the extent to which they are not inconsistent with the Constitution, and (2.) until repealed by the Irish Parliament. The regulations were in force in Ireland when the Constitution came into operation. We have no evidence that the Irish Parliament has repealed or amended them. As to inconsistency with the Constitution I do not think the regulations are inconsistent with either art. 6 or art. 70. The latter

article does not provide that every one shall be tried; only that no one shall be tried except in a certain way; and the former article, if the regulations are law, is not necessarily violated by an observance of the regulations. But reg. 14 B does appear quite inconsistent with the Constitution in this respect. The treaty provides by art. 1 for an Executive in Ireland responsible to the Irish Parliament and that Ireland shall have the position in law practice and constitutional usage of the Dominion of Canada in relation to the Crown. By arts. 2 and 51 of the Constitution provision is made for a purely Irish Executive. It appears quite inconsistent with these provisions that a British official in England should exercise jurisdiction over the Irish Free State, and I do not understand that it is claimed that he can. The result is this: If I am right that the order for internment in Ireland could only be made by the Irish Chief Secretary, it was not so made and is therefore bad; and no such order can now be made, for there is no Irish Chief Secretary or any provision for transference of his powers to some other official. If I am wrong, and before the Irish Free State Constitution Act a Secretary of State could order internment in Ireland, the continuance of this power is inconsistent with the creation of an Irish Executive in the same position as that of the Dominion of Canada, and having in consequence exclusive executive jurisdiction within its territory. Therefore no such order could be made by a Secretary of State after the passing of the Irish Free State Constitution Act, because the previous law allowing it was inconsistent with the provisions of the Irish Constitution so far as they created an Irish Executive, and that previous law was therefore repealed. The power also ceased to exist, because the regulations did not allow internment by order in a place where the person ordering had no control of the internment, and the creation of the Constitution had converted Ireland into such a place as regards the power of control of the Secretary of State.

Next some provisions of the Irish Free State (Consequential Provisions) Act, 1922, require consideration. I did not

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understand that this internment in the Irish Free State was said to be justified under the provisions of s. 7, sub-s. 1, of that Act, and I do not think it could be so contended, for if, as I have held, any powers of the Secretary of State as to Ireland ceased on the passing of the Irish Free State Constitution Act, there were no powers after that that the Secretary could delegate. But the Attorney-General did call our attention to two Orders in Council purporting to be made under the powers conferred by s. 6, sub-s. 1 (*a*), of the Consequential Provisions Act. These Orders were made since the hearing before the Divisional Court, one indeed when the appeal was being heard in this Court; they require very careful consideration. The power given by s. 6, sub-s. 1 (*a*), is by Order in Council to "make such adaptations of any enactments so far as they relate to any of His Majesty's Dominions other than the Irish Free State as may appear to him necessary or proper as a consequence of the establishment of the Irish Free State." This, in my opinion, gives no power to adapt enactments so far as they relate to the territory of the Irish Free State; their effect can only be altered so far as they relate to dominions other than the Free State, and, if it may be necessary, to alter their application in other dominions, because of the establishment of the Irish Free State.

What the first Order in Council of March 27, 1923, has done is this. It has drawn up two classes of Acts, and provided for the meaning of certain terms, including "Ireland" and "British Islands," in each class. In one class, those Acts specified in the Schedule, the terms are to include the Irish Free State, and in the other class, all Acts not specified in the Schedule, the terms are not to include, but to exclude, the Irish Free State. But in each of these classes, if the effect is to alter the previous operation of the Act in Ireland, there is no authority to make such an alteration. The alteration is only to be made in the application of the statutes to dominions other than Ireland. If a specified Act did apply in the territory of the Irish Free State when the Constitution Act came into effect, it continues to apply by art. 73 of the Constitution and subject to the exceptions contained therein,

and s. 6 of the Consequential Provisions Act gives no power to alter that application. The first part of clause 2 of the Order of March 27, 1923, would therefore be ultra vires, and the second unnecessary. It is probable that clause 16 of the Order (1) is intended to recognize that clause 2 as a whole goes beyond its statutory scope, but clause 16 ought also to include Acts which by virtue of art. 73 have ceased to operate in the Irish Free State. If a specified Act by reason of the exceptions to art. 73 of the Constitution did not apply to Ireland, there would be no power to make it apply by virtue of the Consequential Provisions Act. In this case the whole of clause 2 of the Order in Council would be ultra vires.

If the Order in Council of March 27, 1923, were valid, the oddest results would follow. One of the relevant provisions in reg. 14 (*b*) is that the internment may be in any place in "the British Islands." The Schedule to the Order in Council, of the Acts in which "British Islands" includes the Irish Free State, contains this item: "The Interpretation Act, 1889"—as to "the definition of British Islands in s. 18 so far as that section applies to the interpretation of any Act passed after the establishment of the Irish Free State." Now, the Restoration of Order in Ireland Act, 1920, with the regulations made thereunder, having effect "as if enacted in this Act," were passed before the establishment of the Irish Free State. Therefore by the Interpretation Act and the first part of clause 2 of the Order in Council, the term "British Islands" in the regulation is to exclude the Irish Free State, and no internment could be ordered under reg. 14 (*b*) in the Irish Free State. When this was pointed out to the junior counsel for the Crown, he was reduced to arguing that "after the establishment" really meant "before the establishment." The same Schedule, however, includes in the Acts in which Ireland is to include the Irish Free State, the Restoration of Order in Ireland Act, 1920, s. 1, sub-ss. 1 and 4. But if,

(1) By clause 16 of the Order in Council of March 27, 1923: "Nothing in this Order shall affect the construction, in its application to the Irish Free State of any Act which by virtue of art. 73 of the Irish Free State Constitution is to continue in force within the Irish Free State."

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as I have held, these sections, especially sub-s. 1, are inconsistent with the Irish Constitution, which places administrative power in the Irish Executive, the Order in Council under this head purports to re-enact in Ireland an Act otherwise repealed. This appears to me clearly beyond the scope of s. 6 of the Consequential Provisions Act, and therefore ultra vires. It would probably startle the Irish Free State Government to know that His Majesty's Ministers claim that the King on the advice of his British Ministers may by Order in Council impose regulations having the force of statute on the Irish Free State.

But lastly, during the actual argument of this case on appeal—namely, on Saturday, April 21, 1923—another Order in Council was made which included in the Schedule to the first Order of Acts in which "Ireland" and other similar expressions include the Irish Free State the regulations made under the Act of 1920, including, of course, reg. 14 (*b*). It is perhaps beyond the function of His Majesty's judges to criticise the advice which His Majesty's Ministers give to His Majesty as to the issuing of Orders in Council, but it may be permissible to say respectfully that it adds a new terror to litigation with Government officials if they can make Orders in Council while a case is being argued, to assist their argument. In this case, however, I think it is clear that the Order in Council does not assist them. If the regulations were not law in Ireland because they were inconsistent with the Irish Constitution, as placing executive power elsewhere than in an Irish Executive, s. 6 of the Consequential Act confers no power to make them law in Ireland, and the consequent Order in Council is ultra vires and invalid.

I am therefore of opinion that the order of the Secretary of State dated March 7, 1923, ordering the internment of Art O'Brien in the Irish Free State in such place as the Irish Free State Government may determine and subject to all the rules and conditions applicable to persons there interned was illegal on the following grounds: (1.) That it could only be made under the regulations by a Chief Secretary for Ireland; (2.) that if a Secretary of State had originally

power to make it, his power was determined by the setting up of an Irish Constitution and an Irish Executive; (3.) that there was never any power to order internment in a place over which the Government or person issuing the order had no control, or to order arrest for the purpose of such internment; (4.) that so far as the Orders in Council of March 27 and April 21, 1923, purport to support the order they are ultra vires and invalid.

There remains the question whether a writ of habeas corpus is the appropriate remedy for the illegality of the order and detention. It is not asked that we should address the writ to a person resident in Ireland, and I am therefore relieved from the necessity of considering whether the Irish Free State is a "colony or foreign dominion of the Crown" within the meaning of the Habeas Corpus Act, 1862, so that the writ can only issue from the Irish Courts. I regard this as a question of some difficulty. When it is considered the correctness and application of Blackburn J.'s definition in *Ex parte Brown* (1), of "foreign dominions" as "those which have been acquired by conquest from foreign countries within the time of memory," will have to be determined.

Now it has been laid down by the House of Lords in *Barnardo* v. *Ford* (2) that if the Court is satisfied that the body whose production is asked is not in the custody, power or control of the person to whom it is sought to address the writ, a writ of habeas corpus is not the proper remedy, though there was an original illegal taking and detention. The object of the writ is not to punish previous illegality, but to release from present illegal detention. I do not wish to tie myself to the exact degree of power over the body which justifies the issue of the writ, for various high authorities have used different words. Lord Herschell's language is "custody, power or control" (3); Lord Macnaghten's "under control or within reach" (4); Lord Halsbury's "wrongful detention by himself or his agent." (5) The facts in the present case are that the

(1) (1864) 5 B. & S. 280, 295.
(2) [1892] A. C. 326.
(3) [1892] A. C. 338.
(4) [1892] A. C. 340.
(5) [1892] A. C. 333.

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Secretary of State has told the House of Commons (Official Report, vol. 161, col. 2248): "In my opinion the Government has not lost control," and (at col. 2250) "I maintain that with those undertakings given to me by the Free State Government, we have a complete control over the position in which the internees are placed." There is no exact evidence as to the arrangement, except the statement of Mr. Bridgeman in the fifth paragraph of his affidavit, but the Attorney-General told us the "arrangement" was oral. The order for internment is that O'Brien be detained at a place determined by the Free State Government "until further orders." Whose "further orders" is not stated, but the Attorney-General contended before us that after an original order unappealed against the Home Secretary had no power to release the prisoner, or to vary his terms of internment, in the sense that he might make an order, but could not enforce it. The Home Secretary certainly did not say this to the House of Commons; he may not have been thinking about the point, for if he had thought of it, he would hardly have used the language he did. He now says on affidavit that the prisoner is in the custody or control of an Irish official who is not subject to the orders or direction of the Home Secretary or the British Government. On this conflicting evidence, all proceeding from the Home Secretary himself, it appears to me quite doubtful whether or not, if an order is made for the production of the body, the Home Secretary can or cannot produce that body. Under these circumstances I think the proper course to follow is that affirmed by the House of Lords in *Barnardo* v. *Ford.* (1) There Dr. Barnardo alleged on oath that before the issue of the writ he had parted with the body to an independent person; that he did not know where that person or the body were, and had no means of communicating with them; the applicants disputed this on various grounds, and the House of Lords affirmed the order of the Court of Appeal and ordered the writ to issue in order that a return might be made to it, on which return the truth might be ascertained. It may be

(1) [1892] A. C. 326.

that on hearing that in the opinion of this Court the order was issued without legal authority, the Home Secretary with the assistance of the Irish Free State Government will produce the body, as it is hardly in the interests of either Government to act illegally. For these reasons I think that the rule should be made absolute for the writ to issue on the terms of the rule nisi.

ATKIN L.J. On April 13 on the application made on behalf of Mr. Art O'Brien this Court granted a rule addressed to the Home Secretary to show cause why a writ of habeas corpus should not issue to bring the applicant before this Court. The application was supported by an affidavit of Mr. O'Brien dated March 26, on which, on April 10, a Divisional Court had refused a rule. The case made by the applicant was that he was born in England and had resided in England for the last twenty years; that on March 11 he was arrested in London pursuant to an order of the Home Secretary made under reg. 14 B of the regulations made under the Restoration of Order in Ireland Act, 1920, conveyed to Ireland and imprisoned in the Mountjoy Prison, Dublin. It was said that the order was illegal both because the regulation under which it was made had ceased to be operative since the passing of the Irish Free State Constitution Act, 1922, and because of provisions contained in the order itself. It was further said that the Home Secretary had the power to release the applicant. The Attorney-General in showing cause contended that the order was valid; and that in any case the applicant was no longer in the custody or control of the Home Secretary. The case involves questions of grave constitutional importance, upon which I feel bound to express my own opinion, even though I repeat to some extent the views already expressed by the other members of the Court. That a British subject resident in England should be exposed to summary arrest, transport to Ireland and imprisonment there without any conviction or order of a Court of justice, is an occurrence which has to be justified by the Minister responsible. The authority of the Home Secretary is said to be derived from the

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reg. 14 B above referred to, and it becomes necessary to examine with some care the Act of 1920 and the regulations made thereunder and to consider the effect upon them of the Irish Free State Constitution Act, 1922, and the Irish Free State (Consequential Provisions) Act, 1922, and the Orders in Council made thereunder.

Apart from the effect of the creation of the Irish Free State it cannot, I think, be disputed that the powers of making regulations given by the Restoration of Order in Ireland Act, 1920, included the power to make reg. 14 B: *Rex* v. *Halliday* (1), nor can it be disputed in this Court that the regulation empowers the Home Secretary to exercise in England the powers given under it: *Ex parte Brady* (2), a decision which binds me and which therefore I do not discuss. Apart, therefore, from the question as to the form of this particular order, the discussion of which I will postpone, the point for decision is whether the powers of the Home Secretary are affected by the Irish Free State Constitution Act, 1922. The provisions in reg. 14 B empower the Secretary of State by order to require a person to be interned in such a place as may be specified in the order. The regulation does not define internment except by providing that any person interned shall be subject to the like restrictions as a prisoner of war and may be dealt with in like manner as a prisoner of war, but that the Home Secretary may modify such restrictions. I know of no authoritative statement of the restrictions to which a prisoner of war is subject, but ch. 2. of the Hague Convention of 1907 respecting the laws and customs of war on land (to be found on p. 335 of the Manual of Military Law, ed. 1914) contains provisions which I should suppose in substance represent the restrictions intended in the regulations which I need not detail. Whatever the restrictions may be it must be plain that the powers of internment given by the regulations involve the continuous exercise of executive authority by the person exercising them, as to arrest, conveyance to the place of internment, detention there, alteration in the place of internment, variations of the conditions of

(1) [1917] A. C. 260. (2) 91 L. J. (K. B.) 98.

confinement, determination of the period of internment, and eventual release. For the purposes of this argument it is unnecessary to determine whether under the regulation the authority is to be exercised by one Minister exclusively—e.g., either the Home Secretary, or the Secretary for Scotland, or the Chief Secretary, or by two or more of such Ministers in mutual aid. In any case at the time the regulation was made the authority would be exercised by Ministers having executive authority in the area in question and responsible to the Parliament of the United Kingdom. When I consider the effect upon this regulation of the Irish Free State Constitution Act, 1922, I am forced to the conclusion that the executive powers given to the Ministers named in the regulation and essential for the efficiency of any order for internment in Ireland no longer exist. Art. 2 of the Constitution provides that "all powers of government and all authority . . . . executive . . . . in Ireland . . . . shall be exercised in the Irish Free State through the organisations established by or under and in accord with this Constitution." Arts. 51 and following declare that the executive authority in the Irish Free State is vested in the King, and provide that it is to be exercisable in accordance with the law practice and constitutional usage governing the exercise of the executive authority in the case of the Dominion of Canada by the representative of the Crown. There are provisions for the creation of an Executive Council of Ministers who by art. 54 shall be collectively responsible for all matters concerning the Departments of State administered by the Executive Council, while by art. 56 every Minister not a member of the Executive Council shall be individually responsible to Dail Eireann alone for the administration of the Department of which he is the head. By these provisions all executive authority in Ireland of the English Minister is swept away, and it has become impossible for him, to whom alone the powers are given, to intern or keep interned in Ireland any person to whom the regulation might otherwise apply. To this the only answer that could be made was that it was within the power of the English Minister to hand over the person to be interned

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to the custody of the executive officers of the Irish Free State, and to delegate his powers of control to such officers. It was conceded by the Attorney-General that once the applicant was in Ireland the Home Secretary had no legal control. He had a bargain unenforceable at law with the Irish Free State Government that if the advisory committee decided that an interned person ought not to have been interned the Free State Government would return him; but subject to this the Home Secretary had no control over the place of internment, the conditions of internment, the period of internment, or any power of release. It would require very plain words in the Act and regulations to convince me that such a power over the liberty of the subject either was given or authorized to be given to the Home Secretary or other Minister. It is sufficient to say that I cannot find them and I certainly decline to imply them. Very serious powers in derogation of personal liberty have been confided to the Minister responsible to Parliament. At every stage of detention questions may arise affecting the disposition of the prisoner interned. I cannot think that the ultimate determination of those questions was to be left to any one other than the High Officer of State himself and subject to his constitutional responsibility to Parliament.

I think, therefore, that reg. 14 B, so far as it relates to a power to intern in the Irish Free State, is repealed by the Irish Free State Constitution Act. I express no opinion as to the remaining regulations, many of which admittedly it is now impossible to enforce in the Irish Free State. Nor do I express any opinion as to whether the power survives to intern in England or in Northern Ireland.

Having come to this conclusion on the broad constitutional point, I need not deal at much length with the other points raised. But even if there were otherwise power to order a person to be interned in Ireland, I am of opinion that the absence of any power to modify the restrictions incident to internment would in itself be fatal to the validity of the order.

Moreover I think that the Home Secretary had no power

to order the applicant to be interned "in such place as the Irish Free State Government may determine." This seems to me to be the very contrary of a place "specified." The choice of place obviously determines the conditions and restrictions under which the subject is confined, and in my opinion the Home Secretary had no more right to delegate the choice of place to the Irish Free State Government than to the first man he met in the street. I think that on this ground also the order is invalid.

Further I think that the effect of the Orders in Council of March 27, 1923, and April 21, 1923, so far as they are within the powers given by the Irish Free State (Consequential Provisions) Act, 1922, is to take away the express power given in reg. 14 B to require a person to be interned in the "British Islands" so far as that phrase includes the Irish Free State. Clause 2 of the Order of March 27, 1923, provides that in any enactment passed before the establishment of the Irish Free State "British Islands" is to be construed as exclusive of the Irish Free State. I think that the Restoration of Order in Ireland Regulations are to be deemed to be included in such enactments, for such regulations by s. 1, sub-s. 4, of the Act of 1920 are to have effect as if enacted in that Act. The exception in the Schedule referring to the Act of 1920 does not deal with the expression "British Islands" in the regulations, and the general definition of "British Islands" in the Interpretation Act of 1889 is given the restricted meaning by the general clause of the Order, and is only given the extended meaning in the Schedule in reference to Acts passed after the establishment of the Irish Free State. On this very technical point, which I have little doubt is one of inadvertence, I feel bound to hold the order to be invalid, I share the doubts expressed by Scrutton L.J. as to the validity of some of the provisions of the Order in Council, but as I am clear that the Privy Council were not given any power to give to the Home Secretary executive authority in Ireland which otherwise he would not possess, I refrain from dealing further with the matter.

Having come to the definite conclusion that the order made

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by the Home Secretary is invalid and that the imprisonment of the applicant thereunder is unlawful, it only remains to consider whether the writ should go to the Home Secretary. I think that the question is whether there is evidence that the Home Secretary has the custody or control of the applicant. Actual physical custody is obviously not essential. "Custody" or "control" are the phrases used passim in the opinions of the Lords in *Barnardo* v. *Ford* (1), and in my opinion are a correct measure of liability to the writ. It was said that the applicant was in a dilemma, for having relied on the absence of control as constituting the invalidity of the order, he is said to debar himself from asking that the writ should go to the Home Secretary as having control, and the Attorney-General relied upon the absence of control as fatal to the applicant's motion for the writ. In truth there seems to be no dilemma. In testing the validity of the order the question is as to the legal right to control; in testing the liability of the respondent to the writ the question is as to de facto control. In all cases of alleged unjustifiable detention such as arise on applications for the writ of habeas corpus the custody or control is ex hypothesi unlawful; the question is whether it exists in fact. In the present case there may be some doubt. The Home Secretary by the Attorney-General alleged that he has no control; on the other hand the applicant by his affidavit submits reasons for supposing that the Home Secretary is in a position by agreement to cause him to be returned to England, while the answer of the Home Secretary does not in terms deny that he is in such a position; and refrains from stating that he has no control.

The affidavit states that the applicant is in the control of the governor of the prison, and is not subject to the Home Secretary's orders, but this is by no means inconsistent with an agreement with the Free State Government to return on request. I think moreover that the applicant strengthens his case by the reference to the debate in Parliament on Monday, March 19, 1923, a report of which was put in. (2) But without further explanation it seems to me that much

(1) [1892] A. C. 326. (2) Official Report, vol. 161, cols. 2251–52.

support for the contention that the Home Secretary retains de facto control is afforded by the words of the order itself, a copy of which is served on the applicant. The order is that the applicant shall "be interned in the Irish Free State . . . . and shall remain there until further orders." It was conceded that the ordinary interpretation of those words would be until further orders by the Home Secretary, though it was said that in fact he had no power to give such orders. I cannot without further explanation accept this. The order proceeds: "If I am satisfied by the report of the Committee that this order may be revoked or varied without injury to the restoration and maintenance of order in Ireland I will revoke or vary this order by a further order in writing under my hand. Failing such revocation or variation this order shall remain in force." I cannot explain these provisions on the footing that there is no de facto control. In this case it is plain that the applicant was at one time in the custody and control of the Home Secretary by an order which we have held to be illegal. There is, to say the least, grave doubt whether he is not still in the custody or control of the Home Secretary. The case of *Barnardo* v. *Ford* (1) appears to me to afford ample ground for the conclusion that this Court should order the writ to go addressed to the Home Secretary in order that he may deal fully with the matter, and if he has in fact parted with control show fully how that has come about. The rule must be made absolute.

Rule absolute.

The writ of habeas corpus was sealed on May 10, and the notice which accompanied it required the Home Secretary to make the return to the writ and have the body of Art O'Brien before the Court of Appeal on May 16, 1923. On the last-mentioned date the Home Secretary in obedience to the writ returned that Art O'Brien was taken on March 11, 1923, in pursuance of an order made by him dated March 7, 1923, under the Restoration of Order in Ireland Regulations,

(1) [1892] A. C. 326.

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reg. 14 B, and in pursuance of such order was interned in the Irish Free State. He produced the body of the said Art O'Brien in Court. O'Brien was thereupon discharged.

Solicitors for the applicant: *Gisborne, Woodhouse & Co.*
Solicitor for the Home Secretary: *Treasury Solicitor.*

J. F. C.

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[IN THE COURT OF CRIMINAL APPEAL.]

THE KING *v.* FORDE.

Criminal Law—Indecent Assault—Defence—Reasonable Cause to believe Girl over Sixteen—Criminal Law Amendment Act, 1922 (12 & 13 *Geo.* 5, *c.* 56), *ss.* 1, 2.

By s. 2 of the Criminal Law Amendment Act, 1922: "Reasonable cause to believe that a girl was of or above the age of sixteen years shall not be a defence to a charge under sections 5 or 6 of the Criminal Law Amendment Act, 1885. . . . . Provided that in the case of a man of twenty-three years of age or under the presence of reasonable cause to believe that the girl was over the age of sixteen years shall be a valid defence on the first occasion on which he is charged with an offence under this section."

An indictment charged the appellant, a man under twenty-three years of age, with having had carnal knowledge of a girl aged fifteen. It further charged him with indecently assaulting her on two successive days. The appellant pleaded guilty to one of the charges of indecent assault. The only indecent assault was an act of carnal knowledge. The prosecution accepted the plea, and the other counts remained on the file. The Recorder of London granted a certificate for an appeal on the ground that the indecent assault consisted solely in an act of carnal knowledge referred to in the proviso to s. 2 of the Act, and that the appellant had a complete defence to such act of carnal knowledge:—

Held, that the proviso is not applicable to a charge of indecent assault, which is separately dealt with in s. 1, and that the appeal must therefore be dismissed.

Held, further, that upon the trial of a person charged with the offence of having carnal knowledge of a girl under sixteen the question whether the prisoner had reasonable cause to believe that the girl was of or above the age of sixteen is a question of fact for the jury.

APPEAL against a conviction at the Central Criminal Court. The indictment contained four counts. The first count charged the appellant, a man under twenty-three years of

age, with having had carnal knowledge of a young woman aged fifteen years; the second with attempting to have such carnal knowledge; the third with indecently assaulting her on January 12; and the fourth with indecently assaulting her on January 13. The case came before the Recorder. Upon the advice of his counsel the appellant pleaded guilty to the charge of indecent assault on January 12. The prosecution accepted that plea, and the three other counts remained on the file. The Recorder granted a certificate for an appeal upon the ground that the alleged indecent assault "consisted solely in the act of carnal knowledge of a girl under sixteen by a man under twenty-three who had, in law and in fact, a complete defence to such act of carnal knowledge." (1)

Merriman K.C. and *Frampton* for the appellant. The defence created by the proviso to s. 2 of the Criminal Law Amendment Act, 1922, is open to a person charged with indecent assault. In the present case the only indecent assault by the appellant was that involved in the act of carnal knowledge. Where there is one construction of an enactment which leads to absurdity or injustice, and another possible construction which does not lead to such a result, words may be ruled out and the grammatical and ordinary sense may be modified: *Grey* v. *Pearson* (2) per Lord Wensleydale. The Court have only to say that s. 1 must be construed with reference to s. 2. To hold that the defence under the proviso to s. 2 was not open to a person charged with indecent assault would be to reduce the enactment to an absurdity.

[They also referred to *Vestry of St. John, Hampstead* v.

(1) The Criminal Law Amendment Act, 1922, s. 1, provides that "It shall be no defence to a charge or indictment for an indecent assault on a child or young person under the age of 16 to prove that he or she consented to the act of indecency." Sect. 2: "Reasonable cause to believe that a girl was of or above the age of 16 years shall not be a defence to a charge under sections 5 or 6 of the Criminal Law Amendment Act, 1885 . . . . provided that in the case of a man of 23 years of age or under the presence of reasonable cause to believe that the girl was over the age of 16 years shall be a valid defence on the first occasion on which he is charged with an offence under this section."

(2) (1857) 6 H. L. C. 61, 106.

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Cotton (1), and Maxwell on the Interpretation of Statutes, 6th ed., pp. 4, 406.]

Eustace Fulton for the Crown. It may be that the Act of 1922, as it stands, involves an absurdity, but it is impossible to ascertain what was the intention of the Legislature except by seeing what they have actually enacted. These sections clearly provide that while the defence under the proviso to s. 2 is open to a person upon a charge of carnal knowledge, it is not open on a charge of indecent assault.

March 19. The judgment of the Court (Lord Hewart C.J., Avory and Salter JJ.) was read by

AVORY J. This appeal raises a question regarding the meaning and effect of ss. 1 and 2 of the Criminal Law Amendment Act, 1922. [His Lordship read the sections, and continued:] The appellant, who is under twenty-three years of age, pleaded guilty to a count in the indictment charging him with indecent assault on a girl under sixteen years of age, contrary to s. 52 of the Offences against the Person Act, 1861. Another count in the indictment charged him with carnal knowledge of the same girl contrary to s. 5, sub-s. 1, of the Criminal Law Amendment Act, 1885. Counsel for the prosecution at the trial accepted this plea and elected not to proceed further on the indictment, and the appellant thereupon became entitled, if he had so insisted, to have a verdict of Not Guilty recorded on the charge of carnal knowledge, the prosecution having admitted that the only indecent assault alleged was the act of carnal knowledge. The learned Recorder of London has granted a certificate for an appeal to this Court upon the ground "that the alleged indecent assault consisted solely in the act of carnal knowledge of a girl under sixteen by a man under twenty-three who had, in law and in fact, a complete defence to such act of carnal knowledge." From the observations made by him it appears that he was under the impression that it was for him to determine as a question of fact whether the appellant had in the circumstances reasonable grounds for believing that the

(1) (1886) 12 App. Cas. 1, 7.

girl was of or above the age of sixteen years. In this view we think he was wrong. The words in the first proviso to s. 5 of the Criminal Law Amendment Act, 1885, " . . . . if it shall be made to appear to the Court or jury before whom the charge shall be brought," have always been construed to apply respectively to the Court—that is to say, the magistrate or justices before whom the accused is brought with a view to his committal for trial, and the jury when he is put upon his trial. This proviso is repealed by the Act of 1922, and although the proviso to s. 2 of that Act does not contain the words " the Court or jury," we think that upon the trial this question of fact is to be determined by the jury. But it may be assumed for the purposes of this appeal that the prosecution was satisfied that, if the indictment had been proceeded with on the charge of carnal knowledge, the appellant would have had a good defence under the proviso to s. 2 of the Act of 1922, and for that reason accepted the plea to the indecent assault.

The first question that arises is whether this Court can entertain the appeal. A plea of Guilty having been recorded, this Court can only entertain an appeal against conviction if it appears (1.) that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it, or (2.) that upon the admitted facts he could not in law have been convicted of the offence charged. The first ground is not open to the appellant, as he was advised by counsel of experience who had given careful consideration to the facts and to the provisions of the amending statute of 1922, but it has been strenuously contended by Mr. Merriman in an able argument that upon the admitted facts the appellant could not in law have been convicted of the indecent assault. He invited the Court to say that the defence provided in s. 2 of the Act of 1922 was in the circumstances equally available upon the charge of indecent assault—an offence dealt with in s. 1—and that the statute should be so construed as to avoid the absurdity which otherwise would result in circumstances such as those of the present case. In support of this argument he cited cases in which the language of a

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statute has been construed in a modified sense with reference to the obvious intention of the Legislature, but the authorities are clear that, if there is nothing to modify, nothing to alter, nothing to qualify the language, it must be construed in the ordinary and natural meaning of the words and sentences. The words of the statute cannot be construed, contrary to their meaning, as embracing cases merely because no good reason appears why those cases should be excluded. It is not the duty of the Court to make the law reasonable, but to expound it as it stands, according to the real sense of the words. Applying that principle, we can find no justification for reading the proviso to s. 2 of the Act, which in terms is limited to charges of offences under that section, as applicable to a charge of indecent assault, which is separately dealt with in s. 1. It is only by a benevolent construction that any effect can be given to this proviso, seeing that no offence is created by s. 2, but if it be assumed to apply to charges under ss. 5 or 6 of the Criminal Law Amendment Act, 1885, which are referred to in the earlier part of the section, there is no canon of construction which would justify the Court in applying it to s. 1, bearing in mind the various forms of indecent assault which do not amount to carnal knowledge.

The result of this legislation is that a boy who is tempted and induced to have carnal knowledge of a girl who misrepresents herself to be over sixteen, and who appears to be so, has no possible answer if he is charged with indecent assault and not with the full offence.

It is to be observed that the effect of the proviso to s. 2 being applied to charges under ss. 5 or 6 of the Criminal Law Amendment Act, 1885, will be to afford a new defence to a man under twenty-three years of age who has carnal knowledge of an idiot or imbecile female contrary to sub-s. 2 of s. 5 of that statute, a result which probably was never intended, seeing that the object of the Act of 1922 was to curtail and not to extend the defences which were previously open to the accused. Other serious questions will arise in the practical application of this proviso with regard to the burden of proof

and the manner in which it is to be ascertained whether or not the accused has been previously charged with an offence under the section, whatever that may mean, and the effect of such evidence in a case where the previous charge has been dismissed. Any such questions will have to be determined when they arise, and we express no opinion upon them in anticipation. For the reasons given the Court is of opinion that this appeal must be dismissed.

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Solicitors for appellant: *Percy Robinson & Co.*
Solicitors for Crown: *Wontner & Sons.*

F. C.

EAST POOL AND AGAR, LIMITED *v.* REDRUTH ASSESSMENT COMMITTEE AND ILLOGAN OVERSEERS.

1923 *April* 13.

Poor Rate—Tin Mine—Occupation—Abandonment of Part of Subject Matter of Assessment—Value of Occupation when Rate made—Rating Act, 1874 (37 & 38 *Vict. c.* 54), *ss.* 3, 7.

By the Rating Act, 1874, s. 7, "where a tin lead or copper mine is occupied under a lease or leases granted without fine on a reservation wholly or partly of dues or rent, the gross value of the mine shall be taken to be the annual amount of the whole of the dues payable in respect thereof during the year ending on the 31st December preceding the date at which the valuation list is made, in addition to the annual amount of any fixed rent reserved for the same which may not be paid or satisfied by such dues"; and the rateable annual value is, with certain exceptions, to be the same as the gross value thereof.

A company which was in occupation of two tin mines held on leases granted on a reservation of dues with a minimum rent was assessed in one assessment upon the principle laid down in the Rating Act, 1874, s. 7, and a rate was made on that basis. During the currency of the rate the company, owing to bad trade conditions and the high price of materials and labour, had not worked the mines with a view to profit but only to keep the plant and machinery in good order. Part of one mine was flooded and had to be entirely abandoned, but the remainder had been kept intact and a new shaft sunk with a view to resuming operations when commercially remunerative. The company objected to the assessment on the ground that the Rating Act, 1874, s. 7, did not apply and that the mines should be assessed on the ordinary principles of rating

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and then only at their value as a storehouse for machinery and plant. On a case stated at quarter sessions :—

Held, that the company was rightly assessed on the basis of the Rating Act, 1874, s. 7.

CASE stated by consent under 12 & 13 Vict. c. 45, s. 11.

The appellants were a limited company incorporated on January 11, 1913, for the purpose of working certain tin mines known as East Pool and Agar Mines respectively, the East Pool Mine being held under a lease from one Basset and the Agar Mine being held under a lease from Viscount Clifden. The leases in both cases provided for payment by the appellants of dues with a minimum rent merging into dues, such dues being calculated on a sliding scale in accordance with the output of ore. In 1919 the appellants purchased from Basset the freehold of the said East Pool Mine, including the mineral rights therein, and the same were conveyed by a deed of July 7, 1920. In such conveyance there was a declaration that the subsisting estate created by the lease was not to merge in the fee simple, but the appellants had not since the date of the said purchase paid any dues to Basset. In a poor rate made by the Overseers of the parish of Illogan on April 1, 1921, the appellants were rated in one entry as occupiers of certain hereditaments, the property being described as "Pool tin mine dues," the "gross estimated rental" as 5858*l.*, the "rateable value" as 5858*l.*, and the "rate" as 1757*l.* This assessment of 5858*l.* was made up of two sums of 4113*l.* and 1745*l.* in respect of the Agar Mine and the East Pool Mine respectively, of which two sums a return was made at the end of 1920 by the appellants to the respondents in accordance with their usual practice.

It was agreed by counsel for the appellants in the course of argument in the case that the same considerations should be assumed to apply to both mines, and that no point should be taken as to the purchase by the appellants of the East Pool Mine in 1919.

The appellants on May 26, 1921, made objection to the valuation list of the parish before the respondents, but failed to obtain any relief, and consequently gave notice on

August 19, 1921, of their intention to appeal against the above rate to the Court of quarter sessions for the county of Cornwall. The appellants and respondents therefore agreed to state this case for the opinion of the High Court.

Paras. 6–11 of the case stated were as follows :—

" (6) Early in the year 1921 by reason of general trade conditions and the rise in the price of materials and labour and the fall in the price of tin it became unremunerative for the appellants to work the said mines or either of them and on February 12, 1921, all underground working for the extraction of ore from the said mines had ceased. Upon the said date 580 persons were in the employment of the appellants of whom 550 were discharged from the said employment before the end of February. During the currency of the rate appealed against the appellants have not worked the said mines or either of them for profit and have not carried out any work in the said mines, save and except as is set out in the next succeeding paragraph hereof.

" (7) Between April 1 and July 12, 1921, 30 men were retained in employment including the superintendent, the underground manager, the secretary, the watchmen on the different shifts and men engaged in keeping the machinery and plant in good order and in working the pumping engine. During the said period the pumping engine was worked for the purpose of preventing the said mines from being flooded, but pumping was discontinued from July 12, 1921, onwards owing to an accident to the plant caused on May 18, 1921, by a fall of ground. The men engaged on pumping were then discharged and since the said date some 20 men have been employed on part wages for the purposes set out above other than pumping. Since the aforesaid accident a portion of the East Pool Mine has been entirely abandoned owing to the fact that it is flooded, although with regard to the remaining portions of the said mines the plant and machinery have been kept intact with a view to resuming mining operations as and when commercially remunerative, and arrangements were made in or about the month of January, 1922, for sinking a new shaft.

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"(8) The appellants contend

"(*a*) That neither the said mines nor any part of them are in law subject to an assessment based on section 7 of the Rating Act, 1874, but that the ordinary principles of rating apply thereto.

"(*b*) That if the appellants are correct in their contention (*a*) the said mines should be assessed only at their value as a storehouse for the machinery and plant stored thereon.

"(*c*) That in any event the gross estimated rental and rateable value of the said mines should be reduced by reason of the abandonment of a part of the East Pool Mine as set out in paragraph 7 hereof.

"(9) The respondents contend

"(*a*) That the whole of the said mines are in law subject to an assessment based on section 7 of the Rating Act 1874.

"(*b*) That if the said mines are not in law subject to an assessment based on Section 7 of the Rating Act 1874 the basis set forth in the appellants' contention contained in paragraph 8 (*b*) is not correct but the said mines should be assessed as a hereditament fully equipped as mines and capable of being let as such to a tenant.

"(*c*) That the appellants are not entitled to any reduction in value as claimed in their contention set out in paragraph 8 (*c*).

"(*d*) That upon the facts of the case and the law applicable thereto the assessments are correct.

"(10) The Court is to have power to draw inferences of fact.

"(11) The question for the opinion of the Court is whether the appellants or the respondents are right in their respective contentions."

The case concluded with provisions as to the reduction of the assessment, if the Court should hold that the appellants were right in their contention, and, alternatively, that if the Court should hold that the respondents were right in their contentions the assessment appealed against should stand.

Konstam K.C. and *E. H. Tindal Atkinson* for the appellants. The Rating Act, 1874, s. 7, has no application to the case. Prior to 1874 tin mines in common with other mines other than coal mines were not rateable, apart from the surface plant. By the Rating Act, 1874, s. 3, the Poor Rate Acts were extended to "mines of every kind not mentioned in 43 Eliz. c. 2." It was not necessary to specify "surface plant" in s. 3, but it is specified in s. 7, the object being to guard against double rating in respect of the "surface plant," which was rateable prior to the Act. During 1921, the year of occupation in the present case, the mines were not worked and they are therefore only assessable as a storehouse in respect of plant and machinery. In *Van Mining Co.* v. *Llanidloes Overseers* (1) it was held that a lead mining company could not be assessed under the Rating Act, 1874, s. 7, in respect of two pieces of leasehold land, because the land was not being worked as a mine. In *Rex* v. *Inhabitants of Bedworth* (2) the principle was laid down that the occupier of a mine is rateable only for the concurrent annual value during the period for which the rate is made: and that when the thing occupied no longer affords any such concurrent value the subject matter of the rating is gone. In *Tyne Coal Co.* v. *Wallsend Overseers* (3), where a coal mine had been flooded and so had become unproductive, it was held that although, the company was rateable in respect of the surface lands which it occupied, it was not rateable for poor rate for the buildings, engine and plant, inasmuch as these had no value apart from the colliery, which was valueless.

There must be at all events a reduction in the assessment in respect of that portion of the mine which is flooded.

J. A. Hawke K.C. and *William Allen* for the respondents were not called upon.

LORD HEWART C.J. This is a case stated by consent under Baines' Act and it raises a question under the Rating Act, 1874. Shortly, the material facts are, that a poor rate

(1) (1876) 1 Ex. D. 310. (2) (1807) 8 East, 387.
(3) (1877) 46 L. J. (M. C.) 185.

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Lord Hewart C.J.

was made by the respondents upon the appellants on April 1, 1921, in respect of certain tin mines. To this rate the appellants objected and appealed to quarter sessions.

The case discloses that while both the mines in question were originally held upon lease, the freehold of one portion of them was purchased by the appellants in 1919. Counsel for the appellants agreed that no stress was to be laid on the fact of this purchase, and therefore the same considerations apply to the whole of the mines. [His Lordship read para. 7. of the special case and continued :] In these circumstances it is contended by the appellants that neither of the mines nor any part of them are in law subject to an assessment based on the Rating Act, 1874, s. 7, but that the ordinary principles of rating apply ; and that the mines " should be assessed only at their value as a storehouse for the machinery and plant stored thereon." The respondents contend that the whole of the mines are in law subject to an assessment based on the Rating Act, 1874, s. 7. The question argued, and the only question, is whether the matter is governed by the Rating Act, 1874, s. 7. Under the statute of Elizabeth (43 Eliz. c. 2) coal mines were declared to be rateable, but no other mines were mentioned. In consequence of that omission it was held by the Courts in a series of cases that no mines other than coal mines were rateable. These decisions led to the passing of the Act of 1874, by which (inter alia) tin mines were made rateable. By s. 7 of that Act, " where a tin, lead, or copper mine is occupied under a lease or leases granted without fine on a reservation wholly or partly of dues or rent "—as is the case here in fact or by admission—" the gross value of the mine shall be taken to be the annual amount of the whole of the dues payable in respect thereof during the year ending on the 31st December preceding the date at which the valuation list is made, in addition to the annual amount of any fixed rent reserved for the same which may not be paid or satisfied by such dues : " and then s. 7 goes on to provide that the rateable annual value of such mine shall, with certain exceptions, be the same as the gross value thereof. It was indicated in argument that it would be a serious hardship if an unworked mine were

subject to rating on the basis of the annual amount of the whole of the dues of the previous year. Such an argument, I think, has no force when one is dealing with the provisions of a statute. But, clearly, if hardship is to be considered there are certain arguments which might be used with equal force on the other side. Such a mine might escape the burden of rates in the first year and, on the other hand, a number of blank years might be established which would have the effect of reducing the task of rating in the district to a chaotic state. But the question of hardship is not material, nor is it material here to criticize the Act of 1874. The sole matter to be decided is the meaning to be attached to s. 7 of the Act upon this point. Prima facie the mine being a tin mine, the principles laid down in s. 7 itself must be applied strictly. But it is said that if the mine were a coal mine the principle laid down in *Rex* v. *Inhabitants of Bedworth* (1) would apply. The answer is that that case relates to a coal mine only, and it is therefore outside the scope of the Rating Act, 1874; and, secondly, as Lord Ellenborough in that case said: "The mine is exhausted, the subject matter of profit is gone, although the rent, which was no doubt calculated upon the probable average produce during the whole term, be still payable." It is not suggested that that is the condition of the mine in the present case. It is true that a portion of the mine has been abandoned, but that is a situation for which the Act of 1874, s. 7, makes no provision. Therefore in order to accede to the appellants' contention that the provisions of the Rating Act, 1874, s. 7, do not apply one must find either that to all intents the mines have ceased to exist as mines and have become entirely exhausted, or that they are on the same footing with a mine not within the Act of 1874. I cannot accept the appellants' proposition under either head. The Act of Parliament has laid down certain rules to be applied in the case of tin mines as to the quantum of assessment. Para. 7 of the case shows that it cannot be contended that the mine is exhausted. A certain amount of work is being done in the mine; there was

(1) 8 East, 387, 388.

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an evident intention to renew operations; a new shaft has been sunk, and the mines are still treated as productive and as intended to produce. In these circumstances I think that the principles of assessment contained in the Rating Act, 1874, s. 7, apply, that the contention of the respondents is right, and that the assessment appealed against must stand.

AVORY J. I am of the same opinion. The two properties are treated as one hereditament in the rate, and no objection is here taken on that account. Therefore in my opinion the Rating Act, 1874, s. 7, applies to the whole hereditament, and the mines are subject to an assessment based on that section.

ROCHE J. I agree.

Appeal dismissed.

Solicitor for appellants: *Walter J. Payne, for Daniell & Thomas, Camborne.*

Solicitors for respondents: *Robbins, Olivey & Lake, for Grylls & Paige, Redruth.*

F. P. F.

PICKLES *v.* FOULSHAM.

1923
April 30.

Revenue—Income Tax—Income from "possession" out of the United Kingdom —Earnings from Employment Abroad—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case V.*

The appellant was employed abroad for nearly the whole of each year under a contract of service with an English company and was paid a salary and commission, the amount of salary and commission being paid into a banking account in this country. The Special Commissioners of Income Tax held that the respondent resided in the United Kingdom and assessed him under Sch. D, Case V., of the Income Tax, 1918, on his earnings under his contract as in respect of a possession out of the United Kingdom:—

Held, that the appellant had not, under his contract, anything in the nature of a "possession" within the meaning of that expression in Case V.; and, further, that in the circumstances the Court had no jurisdiction to amend the assessment or to send it back to the Special Commissioners.

CASE stated by Special Commissioners of Income Tax.

The appellant Pickles appealed against an assessment to income tax in the sum of 500*l.* for the year ending April 5, 1920, made upon him by the General Commissioners. The assessment was made under Sch. D of the Income Tax Act, 1918, in respect of the appellant's possession out of the United Kingdom—namely, his earnings from his employment in West Africa under the after-mentioned agreement. The representative of the Crown stated that the tax was charged under Case V. of Sch. D, which imposes a "tax in respect of income arising from possessions out of the United Kingdom."

The appellant had been for many years in the employ of the African Association, Ld., now the African and Eastern Trade Corporation, Ld. (hereinafter called "the company"), under agreements which had been renewed from time to time, and in pursuance of these agreements he had for many years past spent the greater part of his time in West Africa. Under the agreement in operation at the material time the appellant agreed to serve the company for a period of two years in West Africa as district supervising agent. He was to spend nine months of each year in the execution of his

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duties in Africa, and the six months' interval between the two periods of nine months was to represent time occupied in voyaging from and to Africa and on furlough. The company was to pay the appellant a salary of 500*l.* per annum while in Africa and voyaging and also for his board and other necessary expenses. While at home the company was to pay him a salary at the rate of 750*l.* per annum. The company also agreed to pay him a certain commission, the minimum commission being 500*l.* Payment of the commission was to be made to the appellant through the company's office in Liverpool only. Clause 11 of the agreement was as follows: "Nothing herein contained shall be held or deemed to amount to an agreement for partnership between the parties hereto it being the sole and true intent of the said parties to create between them the relation of master and servant only and not that of partner and this agreement and every clause matter and thing herein contained shall be read and construed accordingly."

Before April 6, 1919, the appellant had rented a house in Blackpool; he continued to rent it and to be rated as its occupier during the whole year of assessment; and his wife and family resided therein during his absence in Africa. The appellant was not in the United Kingdom between April 6, 1919, and some date towards the end of March, 1920. He was, however, in the United Kingdom between the latter date and April 5, 1920.

The whole of the salary and commission was paid by the company into a banking account in England, on which the appellant's wife had the power of drawing.

On the figures submitted to them the Commissioners found that the average for the three years of the aggregate salary and commission paid to the appellant was 2245*l.*

The appellant contended that the assessment was bad; that if any assessment could be made it should have been made on Mrs. Pickles in accordance with the second proviso to r. 16 of the General Rules applicable to Schs. A, B, C, D, and E, but that remittances from salary were not within the proviso, which applied only to allowances or remittances

from property; and that he was not a person residing in the United Kingdom.

The respondent contended that the appellant was rightly assessed, and that the case was covered by the decision in *Thomson* v. *Inland Revenue*, or *Bensted*. (1)

The Commissioners were of opinion that the assessment was correctly made as to form, and that the case was covered by *Thomson* v. *Inland Revenue* or *Bensted*. (1)

Latter K.C. and *Blanco White* for the appellant. The Commissioners have wrongly held that the appellant's employment in West Africa was a "possession" out of the United Kingdom. To speak of the mere relationship of master and servant subsisting between the company and the appellant as a "possession" is a misnomer, for the appellant possesses nothing in West Africa. *Thomson* v. *Inland Revenue* or *Bensted* (1), upon which the Commissioners relied, does not touch the present case, inasmuch as it was concerned, not with Case V., as this is, but with Cases II. and VI. As the appellant has been wrongly assessed under Case V. he is entitled to a decision in his favour: see per Hamilton J. in *Liverpool and London and Globe Insurance Co.* v. *Bennett*. (2)

[They also contended that the facts did not justify the finding that the appellant was a person residing in the United Kingdom.]

Sir T. Inskip S.-G. and *R. P. Hills* for the respondent. The appellant has been rightly assessed under Case V. The word "possessions" in respect of which he has been assessed is, as was pointed out by Lord Herschell in *Colquhoun* v. *Brooks* (3), a wide expression, and includes the interest which a person in this country possesses in a business carried on elsewhere. In the same case Lord Macnaghten said (4) that "the word 'possessions' is to be taken in the widest sense possible, as denoting everything that a person has as a source of income." The appellant has a source of income derivable

(1) (1918) 56 Sc. L. R. 10; 7 Tax Cas. 137.

(2) [1911] 2 K. B. 577, 591.

(3) (1889) 14 App. Cas, 493, 508.

(4) 14 App. Cas. 514.

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from his interest in his agreement with the African Association, and that is a "possession." If, however, the appellant has been assessed under the wrong head, the Court has power either to correct the mistake or to send the case back: see *Edinburgh Southern Cemetery Co.* v. *Surveyor of Taxes* (1) and *Duncan's Trustees* v. *Farmer.* (2)

[They also argued that the appellant resided in the United Kingdom.]

Latter K.C. in reply. The "possession" of a person means something which he owns; some interest which he possesses in a business, but a whole-time servant, which is what the appellant is, owns nothing in the business under his contract of service: see *Robbins* v. *Inland Revenue Commissioners.* (3) If the assessment is made under the wrong Schedule the Inland Revenue authorities must begin all over again; there is no jurisdiction in this Court or in the Special Commissioners to alter the assessment. Moreover the time has expired in this case.

ROWLATT J. having held that the Special Commissioners were entitled to take the view, which was essentially one of fact, that the appellant resided in the United Kingdom, continued: It was contended for the appellant that he had been wrongly assessed under Case V. in respect of income from a foreign possession. It was said by the Solicitor-General on behalf of the respondent that the appellant's agreement or occupation was a foreign possession and for this proposition he cited *Colquhoun* v. *Brooks.* (4) There Lord Herschell said (5) that "'possessions' is a wide expression, it is not a word with any technical meaning. . . . . I cannot see why it may not fitly be interpreted as relating to all that is possessed in Her Majesty's dominions out of the United Kingdom or in foreign countries and which is a source of income. And if so I do not think any violence would be done to the language if it were held to include the interest which a person in this

(1) (1889) 17 R. 154; 2 Tax Cas. 516.

(2) 1909 S. C. 1212; 5 Tax Cas. 417.

(3) [1920] 1 K. B. 51, 66, 67; [1920] 2 K. B. 677, 682.

(4) 14 App. Cas. 493.

(5) Ibid. 508.

country possesses in a business carried on elsewhere," and in the same case Lord Macnaghten said (1) that " possessions " was " to be taken in the widest sense possible, as denoting everything that a person has as a source of income." In this case, however, there is no interest in question; the appellant has nothing in the nature of a possession. There is nothing he can sell; nothing he can leave; nothing which exists. He is employed under a contract and has a contractual right to continue to be employed, but I cannot say that he has a " possession." Even, however, if it could be said that he has a " possession," it is certainly not a foreign one. The only thing that is foreign is the place where he performs his duties. His rights are not foreign, but are as much British as anything else, if they have any locus, because his contract is with a British company. The assessment was therefore wrong under Case V. Whether he could or could not be charged under Case II. I do not think I am called upon to say.

I cannot, however, accede to the application by the Solicitor-General to send the case back. I would if I could, but I cannot. The time has expired. Moreover, if the appellant is assessable under the other cases a different measure is applicable, and I cannot assess him, nor can the Special Commissioners, for he has a right, if he is to be assessed in a different measure, to be assessed by the Commissioners at the place of his residence. I am wholly without jurisdiction to put the matter right nunc pro tunc. The result is that the appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Withall & Withall.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

(1) 14 App. Cas. 514.

J. S. H.

C. A.
1923
May 3, 4.

[IN THE COURT OF APPEAL.]

WARE *v.* WHITLOCK.

Employer and Workman—Compensation—Infant Workman—Agreement by Father and next Friend as to Amount of Compensation—Recording Memorandum of Agreement—Removal from Register—Jurisdiction of County Court Judge—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sch. II., para.* 9—*Workmen's Compensation Rules, r.* 44 (2.) *and* (6.).

Where an agreement has been entered into between the father as next friend of an infant workman and the employers for the payment of a lump sum by way of compensation for an injury to the infant workman arising out of and in the course of his employment and a memorandum thereof has been duly recorded by the registrar of the county court in the register under the provisions of para. 9 of Sch. II. to the Workmen's Compensation Act, 1906, and the Rules thereunder, the agreement becomes as effective as if it had been signed by the infant workman himself.

Rhodes v. *Soothill Wood Colliery Co.* [1909] 1 K. B. 191 followed.

Where therefore a memorandum of such an agreement has been duly recorded the county court judge, in the absence of proof that the agreement was obtained by fraud, undue influence or improper means, has no jurisdiction either under the Act and Rules or under the inherent jurisdiction of the county court to order the record to be removed from the register.

APPEAL from an award of the judge of the Yeovil County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant, a boy of about fifteen years of age, on April 26, 1921, met with an accident which resulted in serious injury to his eyes. At the date of the accident he was employed as a boy labourer by the respondents, who were farmers, and it was admitted that the accident arose out of and in the course of his employment. At the time of the accident the applicant was earning 15*s.* a week, and from that date till some day in October, during which time the applicant was wholly incapacitated, the respondents paid the applicant by way of compensation full wages, but they had not paid him anything subsequently thereto. As a result of the accident the applicant had been a patient at the Bristol Eye Hospital and at the Weymouth and Dorset Eye County Infirmary, and he had had an operation performed on his

right eye, and there was no doubt but that his eyesight was seriously and permanently injured.

The applicant's father was a traction-engine driver and it was intended that the applicant should follow his father's occupation, but that was now out of the question. Since October, 1921, the applicant had been engaged as an errand boy except during a period of three weeks when he was in hospital after an operation to his eye. As an errand boy he received 13*s.* a week wages, which was 2*s.* a week less than his pre-accident wages.

In November, 1921, negotiations were entered upon between Messrs. Marsh, Warry & Broad, solicitors instructed by the applicant's mother, and the Eagle Star and British Dominions Insurance Company with a view to the payment of a lump sum by the respondents in settlement of all claims by the applicant in respect of the accident. The negotiations were conducted through the post, and resulted in an agreement by the respondents to pay 50*l.* in settlement of the applicant's claim as soon as the agreement had been duly recorded.

On May 20, 1922, Messrs. Marsh & Co. on the instructions of the applicant's father made an application to the registrar in the following terms: "Be it remembered:—that on the 26th day of April 1921 personal injury was caused at Nunney to the above-named Charles Ware an infant of the age of 15 years, by accident arising out of and in the course of his employment. And that on the 11th day of May 1922, the following agreement was come to by and between the said Charles Ware and the said J. A. & H. Whitlock that is to say: The said Charles Ware agreed to accept and the said J. A. & H. Whitlock agreed to pay the sum of fifty pounds (50*l.*) in full settlement and satisfaction of all claims under the said Act arising out of the said accident. You are hereby requested to record this memorandum pursuant to paragraph No. 9 of the Second Schedule to the above mentioned Act. Dated this twentieth day of May 1922." That was signed "A. J. Ware" and the signature was witnessed. It was headed "In the Matter of the Workmen's Compensation

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Act 1906, and In the Matter of an Agreement between Charles Ware"—giving his address—" by his father and next friend, A. J. Ware, and J. A. & H. Whitlock of Manor Farm" and was addressed to the registrar of the county court of Somerset holden at Yeovil. This memorandum was accompanied by a statement in Form 37 to the Workmen's Compensation Rules which was headed in the same way and followed the particulars required by that form so far as they were applicable to this case.

The registrar, on the receipt of these documents, sent out a notice in Form 38, to the effect that the memorandum had been sent to him for registration, that it appeared to affect him, the person to whom the notice was sent, and requested him to give the information mentioned in the form. The registrar also sent out the request in Form 41, for information on any fact relating to the agreement or memorandum, and he sent out again the information in Form 37. Those documents he sent to all the parties interested. No replies to any of these documents having been received by him the registrar, acting under Sch. II., para. 9, proviso (*d*), on July 27, 1922, recorded the agreement, and on September 19, 1922, the respondents under the provisions of r. 53 of the Workmen's Compensation Rules paid the 50*l*. into Court.

On October 12, 1922, an application was made to the judge in the name of the applicant by his father as his next friend, that out of the 50*l*. in Court 14*l*. 18*s*. 7*d*. might be paid to the applicant's father to discharge the expenses incurred by him on behalf of his son and that the balance, after providing for the costs, might be invested. The county court judge being of opinion that the 50*l*. was not an adequate compensation refused to make any order on the application, and intimated that unless the applicant was prepared to make an application and have the register rectified by the removal therefrom of the memorandum of the alleged agreement he should direct the registrar to inquire into the matter and report to him thereon. Thereupon the solicitor who appeared for the applicant, after conferring with the applicant and

with his father, the next friend, stated he would make such an application.

Accordingly on November 22 notice of the application was served on the registrar and the respondents, and a notice was served by the respondents in answer.

The application came before the county court judge on December 7, 1922. No evidence was called for the respondents. It was contended on their behalf that it had not been shown that the agreement recorded was obtained by fraud, undue influence, or other improper means, and that under Sch. II., para. 9 (*e*), the Court had no jurisdiction to remove the record of the agreement from the register unless it had been obtained by one or other of such means.

On January 11, 1923, the county court judge delivered a considered judgment in which, after stating the facts, he said: "In these facts and in these circumstances I hold

"1. That the agreement recorded in the register—namely, an agreement by the applicant Charles Ware to accept 50*l.* in full settlement and satisfaction of all his claims under the Act arising out of the above-mentioned accident, had never in fact been made by the applicant.

"At common law an infant can enter into a contract though generally a contract by an infant is voidable by him on his attaining twenty-one and apart from the Infants Relief Act which has no applicability to this case there is no general statute prohibiting a contract by an infant and in my judgment the agreement referred to in Sch. II., para. 9, in the case of an injured workman is an agreement between the workman and employer even if the workman be an infant.

"2. That there is nothing in the Act which authorizes a next friend of an infant to enter into an agreement to compromise the infant's claims. In the High Court if it is desired to bind an infant by a compromise made by his next friend or guardian ad litem on his behalf proper proceedings have to be instituted and therein the judge may declare that the compromise is for the benefit of the infant and shall be binding on him but before such an order is made the practice which was many years ago laid down by Sir George Jessel

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is that the opinion of counsel is required to the effect that the proposed compromise was for the benefit of the infant and an affidavit by the solicitor engaged in the matter that there was no collusion and even then the judge always personally looked into the matter on behalf of the infant. If it had been intended that the next friend of an infant should be able to compromise an infant workman's claims under the Act an express provision to that effect would have been inserted in the Act and safeguards at least equal to those accorded to an infant under the practice of the High Court would have been provided. I was referred to the rules. Rule 44 (6.) contemplates an agreement made on behalf of a person under disability and r. 51 provides certain safeguards to persons under disability. But in my judgment these rules do not authorise a next friend to compromise an infant's claims and if need be I would further hold that if these rules had any such effect the rules are ultra vires.

"3. That the Court has inherent jurisdiction to purge its records of any entry of a fictitious document and that apart from any such inherent jurisdiction I have jurisdiction under Sch. II., para. 9 (*c*) (1): see *Lunt* v. *Sutton Heath and Lea*

(1) Workmen's Compensation Act, 1906, Sch. II., para. 9: "Where the amount of compensation under this Act has been ascertained, ... by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of Court . . . . by any party interested, to the registrar of the county court who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a county court judgment.

"Provided that —

"(*c*) the judge of the county court may at any time rectify the register; and

"(*d*) where it appears to the registrar of the county court, on any information which he considers sufficient, that . . . . an agreement as to the amount of compensation payable to a person under any legal disability, ... ought not to be registered by reason of the inadequacy of the . . . . amount, or by reason of the agreement having been obtained by fraud or undue influence, or other improper means, he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the judge who shall in accordance with rules of Court, make such order . . . . as under the circumstances he may think just; and

"(*e*) The judge may, within six months after a memorandum of . . . . an agreement as to the

Green Collieries. (1) I therefore order that the record of the alleged agreement of May 11, 1922, be removed from the register and that the respondents do pay the costs of this application."

The respondents appealed. The appeal was heard on May 3 and 4, 1923.

Compston K.C. and *W. R. Howard* for the appellants. The county court judge was wrong in holding that there was no agreement between the applicant and the respondents and that no such agreement could be made. By r. 44, sub-r. 2: "If the matter is decided by agreement, the memorandum shall be authenticated by the signatures or signature of the parties to the agreement or one of them or . . . . in the case of persons under disability, by the signature of their next friend and on their behalf." By sub-r. 6: "An agreement made by or on behalf of any person under any legal disability shall be conditional only unless and until a memorandum thereof has been recorded in accordance with the Act and these Rules."

[LORD STERNDALE M.R. referred to *Rees* v. *Consolidated Anthracite Collieries.* (2)]

An agreement on behalf of a person under legal disability such as an infant is "conditional" in the sense that it is of no validity until recorded, but that it is liable to be set aside unless it satisfies the condition of being for that person's benefit. Accordingly until it is set aside it is just as valid as an agreement made by a person of full age: *Rex* v. *Registrar of Bury County Court.* (3)

[LORD STERNDALE M.R. Avory J. there assumed that the agreement was assented to by the infant.]

The learned judge there thought that if the agreement

amount of compensation payable to a person under any legal disability, ... has been recorded in the register, order that the record be removed from the register on proof to his satisfaction that the agreement was obtained by fraud or undue influence or other improper means, and may make such order . . . . as under the circumstances he may think just."

(1) (1911) 4 B. W. C. C. 219.
(2) (1912) 5 B. W. C. C. 403.
(3) [1918] 2 K. B. 342.

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had been made with the assent of the boy's father it would have been good: see also *Rhodes* v. *Soothill Wood Colliery Co.* (1)

[SCRUTTON L.J. referred to *Pisani* v. *Attorney-General for Gibraltar.* (2)]

Rule 45 requires that notice of the memorandum having been received by the registrar should be sent to all the parties interested. These would presumably include the infant.

Sch. II., para. 9 makes the memorandum when recorded for all purposes enforceable as a county court judgment.

It is submitted that the infant having by his duly constituted representative applied to the Court for payment out of the money paid into Court by the employers is estopped from seeking to have the record removed from the register.

The county court judge had no jurisdiction under the Act and Rules to order the record to be removed from the register in the absence of proof that the agreement was obtained by fraud or undue influence or other improper means: Sch. II., para. 9, proviso (*e*); *Schofield* v. *W. C. Clough & Co.* (3); *Schofield* v. *W. C. Clough & Co.* (4)

Here it is not suggested that there was any evidence that the agreement was obtained by fraud or undue influence or other improper means.

Apart from considerations of mistake and fraud, when a memorandum of agreement has been duly recorded, either by agreement between the parties or by an order of the registrar or judge, the matter is finally determined, and cannot be reopened: *Masterman* v. *Ropner & Sons, Ld.* (5)

The learned judge in dealing with the present case was acting under the particular procedure provided by the Act and Rules, and the inherent jurisdiction of the county court was therefore excluded.

The applicant was not represented on the appeal.

LORD STERNDALE M.R. I think we must allow this appeal. The question is an interesting one, and one which it is not

(1) [1909] 1 K. B. 191.
(2) (1874) L. R. 5 P. C. 516.
(3) (1912) 5 B. W. C. C. 417.
(4) [1913] 2 K. B. 103.
(5) (1909) 127 L. T. Newspaper, 8.

very easy to determine, and we therefore wish we had had the advantage of having it argued on the other side; but, of course, on looking at the circumstances of the applicant and his next friend it is not strange that they have elected not to go to the expense of having the matter argued. I am quite sure Mr. Compston has brought to our notice all the authorities that bear upon the matter, whether they are in his favour or against him, and it is not his fault that most of them appear to be in his favour.

The position is rather a curious one. [His Lordship stated the facts substantially as above set out and read para. 9 (*d*) of Sch. II. He continued:] The matter came before the learned judge on December 7, and a certain preliminary objection was taken with which I need not deal. The result of the application was that the learned judge on January 11, 1923, came to the conclusion that he ought to remove the memorandum of the agreement from the register, and he did so remove it, leaving it open to the applicant to take proceedings for arbitration to assess the compensation.

The question is, had he any power to do that, and, looking at the Rules, it does not seem to me that he had. I am glad to say that I think the matter is covered by authority. A somewhat similar question came before this Court as long ago as 1908, in *Rhodes* v. *Soothill Wood Colliery Co.* (1), and the Court there dealt with the question of the validity or invalidity of the agreement made on behalf of an infant and the effect of an inquiry by the registrar under the provisions of Sch. II., para. 9, to which I have referred, and the subsequent recording of the agreement. Cozens-Hardy M.R. in giving judgment in that case said: "Reading that Act together with the amended rules, I think what they contemplated was this: If there is a person under disability there can be no absolute agreement at all, but there may be that which is very familiar to anybody conversant with dealings in the Chancery Division on behalf of infants, namely, a so-called conditional agreement which is not really an agreement at all, because it is not operative

(1) [1909] 1 K. B. 191, 196, 197.

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unless and until it is sanctioned by the Court on behalf of the infants. The analogous provision in cases under the Workmen's Compensation Act is to this effect. When a sum is brought in by the employer, and somebody on behalf of the dependants says that he thinks that amount is fair and as far as he can agrees to it, that does not become operative at all until the so-called agreement is brought before the registrar whose duty it is to consider it on behalf of the infants. If he is not satisfied he refers the matter to the judge, and the judge, if anything further has to be done, cannot deal with the matter ex parte, but must serve notice on the employer. But when once the conditional agreement, call it what you will, is brought before the registrar and he is satisfied, or does not express dissent and so must be taken to be satisfied, then, the only event in which it can be reviewed not having happened, it is binding in the same way and to the same extent as though there were a formal agreement actually entered into by persons themselves competent to agree." The learned judge then dealt with the liberty given to the employer to pay the money mentioned into Court. I ought to say that the money here was paid into Court under the provisions of the Rules. Fletcher Moulton L.J., who was of the same opinion though he did not express it in quite the same words, said: "Now, looking at the Rules, I am satisfied, after Mr. Shepherd's very clear argument, that what they mean is this: that where an agreement as to the amount to be paid is come to by those persons who are themselves capable of coming to an agreement and who, presumably, have at heart the interests of all who are dependants, such an agreement may be brought before the registrar, and he may sanction it and render it a valid and binding agreement. As the Master of the Rolls has said, it is not when brought before him properly termed an agreement because it is made on behalf of people who cannot make an agreement, but the Act and the Rules give the registrar the power of saying that he is satisfied that the amount of compensation is fair, and then the employer can under the new Rules free himself from all further proceedings and annoyance

by paying it into Court." And his position is, if that were necessary, strengthened by the fact that the agreement when recorded has the effect of a judgment of the county court. The net result of that seems to me to confirm the opinion I had rather formed before, that the Legislature, knowing no doubt what was done with regard to the sanctioning of agreements on behalf of infants both in the Chancery Division and the King's Bench Division, provided in this Act the machinery by which that approval could be given or withheld. No doubt the Schedules to the Act and the Rules were really the code explaining how and in what circumstances the approval of the Court was to be given or withheld, but when that approval has been given and the memorandum of the agreement has been recorded, the recorded memorandum, having then the effect of a judgment of the county court, cannot be removed from the register because the county court judge on some subsequent application thinks that the registrar might have challenged the agreement on the ground of the inadequacy of the amount. That is what the learned judge has done here; he has done it as he says, I think, acting not only under the provisions of the Rules themselves but under the inherent jurisdiction of the county court.

Now, as has been expressly stated by this Court, in circumstances of that kind the inherent jurisdiction of the Court does not come into play. The county court judge was acting under this Act and was bound to act in accordance with it, and in doing what he did, I think, with the greatest respect to him, he went beyond his powers. He may have done, or he may not have done, what, in one of the cases to which we were referred in the county court judge's judgment, was described as a common-sense sort of thing to do; he may be right or wrong from that point of view; but, as was very frankly admitted by the learned counsel who argued that case for the respondent and next friend it is impossible to defend an order on that ground. It may be common sense, or it may not, but it is not a good order unless it is an order which he has power to make under the provisions of the Act. Here, for the reasons I have given, following I think previous

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decisions of this Court, in my opinion he had not the power under the Act to do what he did.

It may, and I think it very likely does follow that, in view of this decision as to his power, the only power he has to remove is in the specific circumstances that are mentioned in another Rule which it is not necessary for me to read. I may conclude by saying that I think neither improper means nor anything of that kind is alleged here. I think also that the application here by the next friend under the direction of the learned county court judge could not succeed for another reason to which Scrutton L.J. has referred—namely, that having applied to record this agreement and having made an application under it to obtain a portion of the money paid into Court by the respondents in consequence of the agreement having been recorded he cannot now turn round and ask that the record of the memorandum may be removed from the register. I think that is very likely the case too, and it seems to me to be supported by the case of *Pisani* v. *Attorney-General for Gibraltar* (1) in the Privy Council to which the Lord Justice referred. But I prefer to decide the present case on the broad ground that there is no power to remove the record of the memorandum from the register, apart from any present disability, if I may say so, on the part of the person who asks for its removal. There was no power in the learned judge to remove the record of the memorandum from the register on the ground on which he did remove it, and I think I ought to say, as he seemed somewhat to rely upon it, the power given to rectify the register, in Sch. II., para. 9, certainly does not authorize such a removal as was made in this case.

I think, therefore, this appeal must be allowed and the order of the learned county court judge discharged.

There is no appearance on behalf of the respondent, and there are no costs.

WARRINGTON L.J. I am of the same opinion. An infant workman was injured. His father, acting on his behalf,

(1) L. R. 5 P. C. 516.

purported to agree for the payment by the employers of a lump sum in the ordinary course, following para. 9 of Sch. II. and the Rules. The father, as next friend of the infant, made an application to have a memorandum of that agreement recorded. The registrar did record it. That memorandum thereupon became enforceable as a county court judgment. The employers shortly afterwards paid into Court the amount which they had, by that agreement, agreed to pay. An application was then made before the learned county court judge for dealing with the amount so paid into Court, and he then took the course which the Master of the Rolls has described, and, eventually, made an order removing the record of this agreement from the register.

Now, he did so, on this ground: he had the infant called, and the infant said he had not made any agreement at all, and the county court judge thereupon treated the alleged memorandum of the agreement as what he describes as a fictitious document, and as not being an agreement at all because, in his opinion, there were no means provided by the Act and Rules by which an agreement might be made by a person on behalf of an infant. That was the ground on which he determined to remove the record of the agreement from the register.

With all respect to the learned county court judge I think that order was wrong, and wrong because the ground on which he made the order had no foundation in point of law. The Act in Sch. II., para. 9 (*d*), provides: [His Lordship read para. 9 (*d*) and continued:] Now, whatever may be the case with regard to compensation payable to a workman, it can hardly be payable to a child of very tender years. There may be compensation payable to dependants who would include babies in arms, who would therefore be physically incapable absolutely of making any agreement at all. The Rules provide, as it seems to me, for the way in which agreements on behalf of persons under disability should be dealt with. Rule 44, sub-r. 2, deals with the memorandum which it is sought to record: "If the matter is decided by agreement, the memorandum shall be

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authenticated by the signatures or signature of the parties to the agreement or one of them, ... or, in the case of persons under disability, by the signature of their next friend on their behalf," and it therefore contemplates that, in such a case, the memorandum shall be sufficiently authenticated if it is signed by the person who makes the application—that is, the next friend. Then sub-r. 6 of the same rule provides: "An agreement made by or on behalf of any person under any legal disability shall be conditional only unless and until a memorandum thereof has been recorded in accordance with the Act and these Rules"; that is to say it is conditional unless and until the sanction first of the registrar, and, in the case provided for, of the judge, has been obtained. The agreement has accordingly been recorded. The joint effect of these statutory provisions is, I think, clearly expressed in the judgment of Cozens-Hardy M.R. which has been read by the present Master of the Rolls, and the effect, if I may paraphrase it, seems to me to be this: there are well known proceedings in the Chancery Division for obtaining an order which will render binding upon an infant an agreement which would not otherwise be binding, if the Court is satisfied it is for his benefit, and the practice pursued in such a case is that somebody on behalf of the infant—preferably his father or his legal guardian—makes an agreement on his behalf which is in terms conditional, usually it would be conditional, anyhow, but it is in terms conditional, unless and until the sanction of the Court is obtained. Application is then made to the Court for its sanction, and if that sanction is given, then the agreement becomes binding upon the infant as if the infant had been a person of full age. That is the ordinary proceeding for obtaining the sanction of the Court on behalf of infants in cases in the High Court, and particularly in the Chancery Division.

Then, as it seems to me, the effect of Sch. II., para. 9, of the Act is to substitute the simpler and less expensive proceedings provided for by that Schedule for the proceedings before the High Court, and that the effect of that is that a person acting on behalf of an infant may, in the first instance,

make an agreement which is conditional until it is recorded, and when it is recorded, as soon as it has obtained the sanction of the registrar in the first instance, and wherever the registrar is not satisfied then of the judge, has obtained the sanction of the Court and has therefore become binding. I do not propose to read the whole of that passage from the judgment of Cozens-Hardy M.R., but what I do read is this: that the agreement, when recorded, "is binding in the same way and to the same extent as though there were a formal agreement actually entered into by persons themselves competent to agree." It seems to me those last few words "by persons themselves competent to agree" show that the learned county court judge was entirely wrong in supposing that the agreement was not binding merely because it had not been made by the infant himself. If it is made by some person on his behalf, and is then sanctioned by the Court in the way provided by the Act and Rules, then it becomes as effective as if it had been signed by the infant.

On that broad ground it seems to me that the order of the learned county court judge is wrong, and that he had no power to remove this agreement from the register.

The only other point about which I wish to say anything is the inherent power which is claimed by the learned county court judge to rectify this register, and to rectify it in the way in which he purports to have done by striking the memorandum of the agreement off it. The power to deal with the register is conferred by the Act. Proviso (*c*) to para. 9 of Sch. II. to which I have already referred gives him in general terms power to rectify. Proviso (*e*) to the same paragraph gives him power, in the circumstances there mentioned, to remove a memorandum from the register.

It has been pointed out in the case of *Schofield* v. *W. C. Clough & Co.* (1) that the power thereby conferred to rectify is one thing and that the power to remove the memorandum of agreement already recorded is another thing. The Act gives the judge power to rectify the register, as, for

(1) [1913] 2 K. B. 103.

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instance, where some mistake has been made in the memorandum in order that he may bring the register into accord with the true facts and make it correct; but the power to remove a memorandum of agreement already recorded is a special power which must be exercised within a limited time and for the reasons expressed in the statute. What the learned judge has done here is not to rectify at all in the way in which rectification is described in the case to which I have referred, but to exercise, for reasons not expressed in the statute, the power to remove the memorandum from the register.

For these two reasons I come to the conclusion that the order of the learned county court judge was wrong and must be set aside, and the memorandum restored to the register.

SCRUTTON L.J. I agree.

Appeal allowed.

Solicitors for appellants: *Leonard Bingham & Sharp.*

W. I. C.

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ORD *v.* ORD.

Revenue—Income Tax—Annuity—Omission to deduct Income Tax "on making such payment"—Right to recover back—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *All Schedules Rules, r.* 19, *sub-r.* 1.—*Res judicata.*

In paying instalments of an annuity to his wife under a deed of separation the husband did not deduct income tax, believing that on the construction of the deed he was not entitled to do so:—

Held, that as he had not made the deduction "on making such payment" within r. 19, sub-r. 1, of the All Schedules Rules to the Income Tax Act, 1918, he was not entitled to recover back the amount of the deduction.

In an action by the wife for arrears of the above annuity the husband claimed that the deed of separation under which the annuity was payable should be cancelled having, as he alleged, been obtained by fraudulent concealment of the previous adultery of the wife with F. No particulars of acts of adultery were pleaded. The judge found that the adultery was not proved. In a subsequent action for further arrears the husband raised the same plea, again giving no particulars of acts of adultery. It was stated by counsel and on affidavit that fresh alleged acts of adultery with F., also committed before the execution of the deed, but discovered since the first action, would be relied on. The county court judge,

without hearing evidence, held that the issue of adultery was res judicata, and refused to try it.

Held, that inasmuch as the issue in the first action was, in the absence of particulars of adultery, such acts of adultery as should appear in evidence, and in the second action, again in the absence of particulars, such acts as should similarly appear, the matter was not necessarily res judicata, and that the case must go back for a new trial to ascertain the nature of the present allegations of adultery.

APPEAL from Darlington County Court.

The parties to this appeal were husband and wife who were married in 1912. On November 2, 1920, a deed of separation was entered into whereby the defendant, the husband, covenanted (inter alia) to pay his wife, the plaintiff, 104*l.* 8*s.* annually by equal monthly instalments, "free of any deduction whatever." On August 9, 1922, the wife brought an action in the county court to recover 15*l.* 2*s.*, arrears of this annuity. The husband by his defence said he had been induced to enter into the deed of separation by fraudulent concealment of facts by the wife—namely, that before the date of its execution she had committed adultery with one Fuller and had fraudulently concealed the fact from him, and claimed cancellation of the deed. No particulars of a specific act or acts of adultery were asked for or given. The county court judge held that the adultery had not been established and gave judgment for the wife on November 1, 1922. The husband had asked for an adjournment on the ground that his chief witness as to the adultery was unfit to travel, but this was refused. On November 29, 1922, another action was brought by the wife in the same court claiming further arrears, and the husband again filed a plea similar to that in the first case. It was stated by counsel that the husband was relying on acts of adultery with Fuller other than those alleged in the first action, and also alleged to have been committed before the execution of the above deed, but discovered by him after the judgment in the first action. No other particulars of adultery were given in this second action. The husband also counterclaimed for the amount of income tax on the annuity instalments which he had paid, but had not deducted, in the belief that he was not

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entitled to do so. The county court judge held that the matter of the alleged adultery was res judicata, and declined to try the question again. He also decided against the husband on the counterclaim on the ground that the deductions should have been made at the time of payment, and gave judgment for the plaintiff on the claim and counterclaim.

The defendant, the husband, appealed.

Wightman Powers for the appellant, the husband. The husband is entitled to succeed on the counterclaim. He paid the income tax under a mistake of law, that is, of the legal effect of the clause in the deed of separation that payments should be "free of any deduction whatever." There is a distinction between a mistake of what may be called public law and a mistake as to the construction of documents creating private rights: *Earl Beauchamp* v. *Winn* (1) and per Neville J. in *In re Musgrave*. (2) No doubt the maxim "Ignorantia juris neminem excusat" is rigidly applied at common law, but equity takes a wider view: *Stone* v. *Godfrey*. (3)

[LUSH J. referred to *Holt* v. *Markham*. (4)]

Alternatively the husband is entitled to the amount paid for income tax as money paid to his use. The wife was ultimately chargeable to the tax, although for convenience of collection it was made payable by the husband: Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), General Rules Applicable to Schedules A, B, C, D, and E, r. 19, sub-r. 1. In paying the tax, therefore, the husband was making a payment on behalf of the wife. The principle should be that adopted by Bayley J. in *Stubbs* v. *Parsons* (5) and in *Agnew* v. *Ferguson* (6) in Scotland. The fact that the debt could not be enforced against the plaintiff by the Crown does not affect the principle that one who pays another's debt under compulsion can recover payment from that other. *In re Hatch* (7) is

(1) (1873) L. R. 6 H. L. 223.
(2) [1916] 2 Ch. 417, 424.
(3) (1854) 5 D. M. & G. 76, 90.
(4) [1923] 1 K. B. 504.
(5) (1820) 3 B. & Al. 516, 520.
(6) (1903) 5 F. 879.
(7) [1919] 1 Ch. 351.

apparently against the husband's contention, but does not conflict with the above principle, which was not adverted to in that case. It is immaterial that at the time he paid the income tax he thought he was not entitled to deduct it.

This was not res judicata—the res in the first action was adultery on particular occasions; in the present action the res was adultery on other occasions. The second res has never been adjudicated upon. Moreover the judge decided that the matter was res judicata before he heard the evidence which would show what the question in the case was, so that he could not properly decide whether it dealt with the same matter as did the first case.

[Everest and Strode on Estoppel, 2nd ed., p. 90, was also referred to.]

Willoughby Williams for the respondent, the wife. Although the acts of adultery were different in the two cases the issue was the same—namely, adultery or no adultery—and that issue the husband must prove once for all. The present allegations might have been set up in the first action, and the husband is estopped from raising them now. The res was adultery with Fuller, and it has been adjudged that it did not take place.

[LUSH J. The county court judge did not find that the wife had never committed adultery. That issue was still open.]

The acts of adultery are only evidence to support the plea. The husband is saying "I failed to prove adultery before, but I have found fresh evidence and want the issue tried again."

[The *Duchess of Kingston's Case* (1) was referred to.]

The judge was right in holding that the husband could not recover the income tax paid by him. He paid either voluntarily or under a mistake of law. Rule 19, sub-r. 1, of General Rules provides that the deduction shall be made "on making such payment," and it cannot be made afterwards: *Cumming* v. *Bedborough* (2); *Warren* v. *Warren* (3); *Shrewsbury* v.

(1) (1776) 2 Smith's L. C., 12th ed., 754, 787.

(2) (1846) 15 M. & W. 438.

(3) (1895) 72 L. T. 628.

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Shrewsbury (1); and *In re Hatch.* (2) The position is the same as in the case of property tax, as to which Buckley L.J. said in *Duke of Beaufort* v. *Inland Revenue Commissioners* (3): "The person so paying the property tax who omits to deduct it from his next payment of rent has no right to deduct it subsequently."

[*Hill* v. *Kirshenstein* (4) was also referred to.]

Wightman Powers in reply.

Cur. adv. vult.

1923. April 23. LUSH J. read the following judgment: This case raises two distinct and separate questions, each of some novelty and difficulty. The first relates to a claim by a wife against her husband for arrears of an annuity alleged to be due on a covenant by the husband in a deed of separation. The other relates to a claim by the husband to recover a sum of money paid to the revenue authorities for income tax in respect of past payments of the wife's annuity, which payments he omitted to deduct when he paid the instalments of the annuity. The proceedings were taken in the Darlington County Court. The learned judge gave judgment for the wife on both claims, and the husband appeals.

I will deal first with the wife's claim for the annuity. The separation deed is dated November 2, 1920, the husband and wife being the sole parties. It contains the usual clauses. The husband covenants to pay 104*l.* 8*s.* a year to his wife by equal monthly instalments. In 1922 the wife brought an action in the county court for unpaid arrears of her annuity. The husband had refused to pay it on the ground that the wife had, as he alleged, prior to the execution of the deed, committed adultery with one Fuller and had fraudulently concealed the fact from him. There is no doubt that if the adultery had been proved, and if it had been proved that the husband was ignorant of it when he executed the deed, he would not be bound by its provisions.

(1) (1906) 23 Times L. R. 100.
(2) 1 Ch. 351.
(3) [1913] 3 K. B. 48, 58.
(4) [1920] 3 K. B. 556.

A deed of separation can be avoided on that, among other grounds. A husband is not liable at all for the maintenance of an adulterous wife, and if she has concealed the true facts from him and thereby induced him to agree to pay her an allowance and to her living apart from him on the terms contained in the deed, he can avoid it. There are, as I have said, other ways of avoiding a separation deed. If the wife, for example, obtained her husband's consent to it with a view to living in adulterous intercourse with another man, the husband could repudiate it and get it set aside, although no prior adultery had been proved: see *Evans* v. *Carrington*. (1) Before the case came on for trial the husband, the defendant, filed a plea in the following terms: "That he was induced to enter into the deed of separation by fraudulent concealment of the material facts—namely, that the plaintiff had been guilty of adultery previously to its execution with one Fuller. The defendant claims cancellation of the said deed of separation." No particulars of the specific act or acts of adultery relied upon were asked for or given. When the case came on for hearing the defendant's solicitor applied for an adjournment on the ground that his chief witness could not attend to give evidence. The witness was, it appears, expecting her confinement, and was unable to travel. Although this fact was not disputed, the learned judge, for some reason which is not apparent, refused to adjourn the case, and the defendant's solicitor had to proceed as best he could. He called witnesses, but failed to satisfy the learned judge of the act of adultery to which this witness deposed, and the learned judge gave judgment for the wife, saying that the defendant had failed to prove that his wife had committed adultery as alleged. The husband subsequently ascertained, as he alleged, that other acts of adultery had been committed in addition to that which had been deposed to at the trial, and applied to have the judgment set aside, and for an order for a new trial. This also the learned judge refused. The wife afterwards commenced the present action for subsequent arrears of the annuity. The husband filed a plea in that

(1) (1860) 2 D. F. & J. 481.

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action also, which is substantially a repetition of the plea in the first action. No particulars were asked for or delivered in this second action. There was nothing, therefore, to show that the husband was relying on the act of adultery which had been negatived in the first action. We were told by counsel that fresh acts of adultery were relied on and that the husband was in a position to call fresh witnesses to prove them. We were shown an affidavit which has been sworn in the appeal which bears this out. When this second action came on for hearing before a jury, the learned judge's attention was called to the plea, and having read it, he held that the defence was not open to the husband, on the ground that the matter was res judicata, it having been held in the previous action that the wife had not committed adultery and that there had been no fraudulent concealment. His judgment on this point is very short, and I will read it. "In such previous action the defendant called a mass of evidence with the object of establishing his allegation of fraud, but after hearing and considering such evidence I held, on the facts, the defendant had failed altogether to prove that his wife had committed adultery as alleged and gave judgment for the plaintiff upon both the claim and the counterclaim. I accordingly hold that this is a question of res judicata and decline to allow the question to be tried again in the second action."

The question we have to decide is, whether that view of the learned judge was right? Before dealing with it, I feel obliged to say this. I think it is greatly to be regretted that the learned judge refused to grant the adjournment that was asked for at the first trial. There was no question as to the bona fides of the application. Through no fault of his, the defendant was prevented from calling the evidence that he wished to call in support of his case, and he was forced to go to trial without it. Every one who knows the learned judge would be sure that he intended to do what was just, but there is no concealing the fact that it placed the defendant in a position of grave difficulty and has prevented him from ever presenting his real case to the Court. It is not even as if the particular instalment there being sued upon was all

that was in dispute. According to the learned judge's view, the question of the validity of the deed for all time was being decided, and he was debarring the defendant from ever contending that his wife had committed adultery, however conclusive the evidence that he might obtain might be. I think the learned judge made a mistake in dealing with the case as he did. A litigant who, through no fault of his, is prevented from calling his material witness is entitled, subject of course to terms as to costs, to an adjournment as a matter of justice, and this defendant was denied it, and his case has been tried and decided without being fully heard. I am not at all sure we could not, if it were necessary, enlarge the time and entertain an appeal from the first order that the learned judge made, and also from his refusal to grant a new trial when the true position was brought to his notice. But however that may be, in my opinion, the learned judge was wrong in holding that the matter was res judicata, and we must order a new trial.

Now, there is no difficulty in seeing what, in its strict and proper sense, the plea of res judicata means. The words "res judicata" explain themselves. If the res—the thing actually and directly in dispute—has been already adjudicated upon, of course by a competent Court, it cannot be litigated again. There is a wider principle, to which I will refer in a moment, often treated as covered by the plea of res judicata, that prevents a litigant from relying on a claim or defence which he had an opportunity of putting before the Court in the earlier proceedings and which he chose not to put forward, but I am dealing for the moment with res judicata in its strict sense. As is said in the notes to the *Duchess of Kingston's Case* (1), if the truth has been ascertained, the party against whom it has been ascertained is taken as admitting it. This is what the learned author says (1): "An estoppel, therefore, is an *admission*; or something which the law treats as equivalent to an admission, of an extremely high and conclusive nature—so high and so conclusive, that the party whom it affects is not

(1) 2 Smith's L. C., 12th ed., 754, 767.

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permitted to aver against it or offer evidence to controvert it." The litigant must admit that which has been judicially declared to be the truth with regard to the dispute that he raised. In order to see what the fact is that he must admit the truth of one has always to see what is the precise question, the precise fact that has been disputed and decided. This has constantly been stated to be the law. It is not correct to say, as the learned judge evidently thought, that because the defendant pleaded that he had been induced to enter into the deed of separation by fraudulent concealment of the fact that his wife had committed adultery, and because the first plea had failed at the previous trial, it was not competent for the defendant afterwards to prove a different offence from that which had been negatived at the trial. That he took that view is clear, because he ruled that the matter was res judicata without inquiring into the question whether the offence or offences sought to be proved were the same or were different offences from those which had been investigated at the former trial. All that the defendant was obliged to admit to be true was that his wife did not commit the specific act of misconduct which the witnesses who were called had spoken to. The question whether she committed the other offences has never been investigated or decided, and it has never, therefore, been decided to be true that she was not guilty of any act of misconduct. The plea only means this, that the defendant alleges a certain act, or acts, of misconduct specified in particulars, if any are given, if not, to be specified in the evidence, and that he will ask the Court to hold that by reason of those acts which were concealed in fraud of him he is not bound by the deed.

The effect of a judgment is thus stated by Sir J. Fitzjames Stephen in his Digest of the Law of Evidence, 10th ed., p. 53: "Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the Court, and appearing from the judgment itself to be the ground on which it was based." There was an exception as to evidence which is not material in the present

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case. Thus in *Boileau* v. *Rutlin* (1) it was held as follows. There was a question as to whether pleadings in equity as well as at common law were subject to this principle of res judicata. I need not trouble about that, but the headnote goes on thus: "The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are conclusive evidence between them; so are the material facts alleged by one party which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, if the traverse is found against the party making it." That was the principle laid down in *Boileau* v. *Rutlin*, and Parke B. says this (2): "The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are evidence between them, and that conclusive, upon a different principle, and for the purpose of terminating litigation"—and then Parke B. went on to deal with admissions and stated what in effect is set out in the headnote that I have read. In *Reg.* v. *Hutchings* (3) Lord Selborne, after citing the judgment in the *Duchess of Kingston's Case* (4), quotes Knight Bruce V.-C. with approval, who in his judgment in *Barrs* v. *Jackson* (5) said: "It is, I think, to be collected, that the rule against re-agitating matter adjudicated is subject generally to this restriction—that however essential the establishment of particular facts may be to the soundness of judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object." In *Heath* v. *Weaverham Overseers* Collins J. said (6): "Then it is said that the decision in *Reg.* v. *Heath* (7)

(1) (1848) 2 Ex. 665.
(2) Ibid. 681.
(3) (1881) 6 Q. B. D. 300, 304.
(4) 20 How. St. Tr. 355, 537n.; 2 Smith's L. C., 12th ed., 754, 755.
(5) (1842) 1 Y. & C. Ch. 585, 597.
(6) [1894] 2 Q. B. 108, 115.
(7) (1866) L. R. 1 Q. B. 218.

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prevents us from going into the matter. I do not think so. We are entitled to go behind that decision, and to see on what facts it was given in order to say whether it amounts to an estoppel or not." Then the learned judge sets out what the facts were and decides that the appeal ought to be dismissed. It is often necessary to see what the evidence before the Court at the previous trial was in order to see what the precise facts were that cannot afterwards be disputed. Thus in *Brunsden* v. *Humphrey* Brett M.R. said (1): "Different tests have been applied for the purpose of ascertaining whether the judgment recovered in one action is a bar to a subsequent action. I do not decide this case on the ground of any test which may be considered applicable to it; but I may mention one of them; it is whether the same sort of evidence would prove the plaintiff's case in the two actions. Apply that test to the present case," and then the Master of the Rolls held that evidence would be different in the two cases, and, therefore, the principle relied on, that is, estoppel, did not apply. Bowen L.J. says (2), quoting the judgment of De Grey C.J. in *Hitchen* v. *Campbell* (3): "'The principal consideration is, whether it be precisely the same cause of action in both, appearing by proper averments in a plea; or by proper facts stated in a special verdict, or a special case. One great criterion of this identity is that the same evidence will maintain both actions'"; and the Lord Justice refers again (4) to the fact that if the same evidence will support the action there is estoppel, and, if it will not, there is no estoppel. So in *Macdougall* v. *Knight* (5) it was laid down that a second action can only be barred by a judgment in an earlier action when it is clear that the question for the jury is the same in both. In the case of *Concha* v. *Concha* (6) the House of Lords held that estoppel by record does not operate necessarily as to all the facts which were decided in the previous litigation, but only as to matters necessary to be decided, a principle which Chitty J. in *In re Allsop and*

(1) (1884) 14 Q. B. D. 141, 145-6.
(2) 14 Q. B. D. 147.
(3) (1771) 2 W. Bl. 827, 831.
(4) 14 Q. B. D. 149.
(5) (1890) 25 Q. B. D. 1.
(6) (1886) 11 App. Cas. 541.

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Joy's Contract (1) ruled applies to estoppel inter partes as well as to estoppel by a judgment in rem.

The last case that I need cite in this connection and one that has a direct bearing on the present case is *Hunter* v. *Stewart*. (2) In that case Lord Westbury, after quoting from the judgment in the *Duchess of Kingston's Case* (3), says (4): "One of the criteria of the identity of two suits, in considering a plea of res judicata, is the inquiry whether the same evidence would support both." It is clear, therefore, that if the defendant's claim to have the deed of separation cancelled is considered, there is nothing to prevent him relying on a different offence from that which he failed to establish at the first trial. His failure to prove the first offence charged cannot deprive him of his rights, on proof of a fresh offence.

It remains for me to deal with the other, the wider principle to which I have referred and which is often treated as falling within the plea of res judicata. The maxim "Nemo debet bis vexari" prevents a litigant who has had an opportunity of proving a fact in support of his claim or defence and chosen not to rely on it from afterwards putting it before another tribunal. To do that would be unduly to harass his opponent, and if he endeavoured to do so he would be met by the objection that the judgment in the former action precluded him from raising that contention. It is not that it has been already decided, or that the record deals with it. The new fact has not been decided; it has never been in fact submitted to the tribunal and it is not really dealt with by the record. But it is, by reason of the principle I have stated, treated as if it had been. This is well illustrated in *Brunsden* v. *Humphrey* (5), to which I have already referred. Bowen L.J. said (6): "The real test is not, I think, whether the plaintiff had the opportunity of recovering in the first action what he claims to recover in the second. With all respect, I do not see how it can be said that *Nelson* v. *Couch* (7) so decides. That case establishes only the converse

(1) (1889) 61 L. T. 213.
(2) (1861) 4 D. F. & J. 168.
(3) 20 How. St. Tr. 355, 538n.; 2 Smith's L. C., 12th ed., 754, 755.
(4) 4 D. F. & J. 168, 178.
(5) 14 Q. B. D. 141.
(6) Ibid. 151.
(7) (1863) 15 C. B. (N. S.) 99.

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rule, viz., that the maxim 'Nemo debet bis vexari' cannot apply where in the first action the plaintiff had no such opportunity of satisfying his claim." In *In re Hilton* (1) Vaughan Williams J. states the principle in substance as I have stated it. The learned judge in this case, as I have said, never considered the question whether the offences sought to be charged at the second trial were the same offences which the defendant sought unsuccessfully to prove at the first trial. He never considered whether the defendant had had the opportunity of proving them and had chosen not to do so. As I have said, we were told in fact they were new offences, and I understand that they have recently come to the defendant's knowledge. At all events these are matters which must be inquired into. The witness who was not in a position to give evidence at the first trial may, for aught that appears, be prepared to prove acts of misconduct not spoken to by the other witnesses who were called, and as the learned judge refused to allow her an opportunity of giving evidence, it cannot be said that the defendant chose not to call her. The witnesses in the first action cannot be called to give evidence again for the purpose of proving that the acts of misconduct that were negatived were in fact committed, but their evidence would be admissible in corroboration of the evidence of the other witnesses as to the conduct of the plaintiff generally.

The result is that this judgment must be set aside and there must be a new trial as to misconduct.

The other question raised on the appeal can be briefly dealt with. It is this. The defendant has paid income tax on the instalments of the annuity which he paid to his wife, as he was obliged to do under the Income Tax Act, 1918. He was under the impression when he paid it that his wife was entitled to the annuity free of tax by reason of the fact that the separation deed provided that it was to be paid free of any deduction whatever. He, therefore, did not deduct the amount that he had paid free of tax, but paid the annuity in full. He has since discovered that this view was wrong

(1) (1892) 67 L. T. 594.

and that the words "free of any deduction" do not include income tax, and he counterclaimed in his wife's action to recover what he had paid and failed to deduct. The learned county court judge decided against him and he has appealed against this part of the judgment also.

Now, the position of the payer of an annuity is this: He is the only person assessed and he has to pay the tax, although it is in fact charged upon the annuitant: see Dowell on Income Tax, 8th ed., pp. 397, 527. This is the effect of General Rules, r. 19, sub-r. 1. The last mentioned rule provides that the payer may deduct the tax. I need not read it; it is a rule which allows the person who pays the annuity to deduct the amount of tax that he has paid from the amount of the annuity that he is paying, in respect to the period covered by the tax. The rule does not in terms say that if the person paying is to deduct tax, he must deduct it from the next instalment of the annuity, as is provided in the case of a tenant paying property tax, but the language of the rule, in my opinion, shows that that is intended. Whether the rule means that the only remedy of the payer of the annuity is to deduct the tax is a difficult question, as to which I think the authorities differ. If the defendant had not voluntarily paid to his wife the sum that he paid on her behalf by way of tax, it may be (it is not necessary to decide it) that he could maintain an action against her for money paid to her use. He no doubt is the only person assessed, but that is for purposes of collection. It may be said that although the annuitant is not assessed, it is his debt that has been paid, and that an action can be maintained for money paid to his use. This was the view of the majority of the Court in a Scotch case, *Agnew* v. *Ferguson*. (1) But, as Lord Moncreiff points out in his judgment (2), if the payer has voluntarily paid the amount to the annuitant, it may well be that he cannot recover it; and that is I think the true view. The defendant here paid this money voluntarily to his wife. He did not pay the tax on behalf of her, or at her implied request. He is really

(1) 5 F. 879. (2) 5 F. 885.

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and in substance claiming to recover back what he has paid under a mistake of law. That is, in substance, what his claim is, though not so in form.

In my opinion and in the circumstances, the defendant, having paid the money as he has done, is not entitled to recover it as money paid to his wife's use, or otherwise. This part of the judgment, therefore, was I think right, and in this respect the judgment must be affirmed. In the circumstances, each party must pay his own costs of the appeal.

SALTER J. I entirely agree. On the first point I will add only this. We are not deciding that the matter is not res judicata, but only that the learned judge held the res to be judicata without sufficient inquiry as to the nature of the res. It will be determined in due course whether the matter now in dispute has, or has not, been the subject of previous decision.

On the second point I have nothing to add.

Appeal allowed in part.

Solicitors for appellant: *Smith, Rundell, Dods & Bockett, for Wooler & Wooler, Darlington.*

Solicitors for respondent: *Howe & Rake, for Lucas, Hutchinson & Meek, Darlington.*

W. L. L. B.

RYALL (Inspector of Taxes) *v.* HOARE.

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RYALL (Inspector of Taxes) *v.* HONEYWILL.

Revenue—Income Tax—Commission on Bank Guarantee—"Annual profits or gains"—Casual Profits—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, para.* 2, *Sixth Case.*

By the Income Tax Act, 1918, Sch. D, para. 2: "Tax under this schedule shall be charged under the following cases respectively: that is to say . . . . Case VI.—Tax in respect of any annual profits or gains not falling under any of the foregoing cases, and not charged by virtue of any other schedule."

Commission paid to a person in consideration for the guarantee of an overdraft at the bank is properly assessed to income tax under the above Case, even though the transaction is an isolated one and represents a casual profit only.

Meaning of "annual profits or gains" as used in the Sixth Case of Sch. D discussed and explained.

Two cases stated under the Taxes Management Act, 1880, s. 59, by the Special Commissioners for the opinion of the Court.

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At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on February 2, 1921, for the purpose of hearing appeals, Stanley Hoare (hereinafter called "the respondent") appealed against assessments to income tax in the sum of 200*l.* for the year ending April 5, 1918, and in the sum of 400*l.* for the year ending April 5, 1919, made upon him by the Additional Commissioners of Income Tax for the Tower Division under the provisions of the Income Tax Acts in respect of two commissions received by him in consideration of his guaranteeing an overdraft allowed by the London City and Midland Bank, Ld., to a company, known as C. W. Waters, Ld., of which the respondent was chairman.

C. W. Waters, Ld. (hereinafter referred to as the "company"), was a private company incorporated under the Companies Acts on May 30, 1905, with an authorized capital of 40,000*l.* in 1*l.* shares, of which 30,000 shares had been issued and paid up. The company carried on the business of paint and varnish manufacturers, and for the purposes of this business

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it required large quantities of shellac, for which payment had to be made on delivery. During the war, the company's business expanded and the price of shellac rose, with the result that the company, though carrying on a large and profitable trade, was in a serious financial position. Its debts amounted to 14,915*l.*, including an overdraft of 5000*l.* due to the London City and Midland Bank, Ld., and further money was urgently required for the purchase of raw material. The bank refused to give the company any greater credit, but after negotiations consented to allow the overdraft to be increased to 10,000*l.* on condition that the three directors of the company gave their personal guarantee, jointly and severally, for the repayment of that amount. The directors were willing to give the required guarantee on receiving a bond of indemnity and charge from the company, but strong objection to this being given was raised by the managing director on the ground that it would be necessary to register such a charge, and the company's credit would thereby be gravely injured.

Eventually the directors consented to give the required guarantee and to waive the bond of indemnity and charge in consideration of being allowed and paid a commission of 2 per cent. each on the whole amount guaranteed, the guarantee to be in operation for a period not exceeding one year from May 24, 1917, on which date the guarantee was signed by the respondent and his two fellow-directors. The arrangement for commission was subject to confirmation by the company in general meeting. At the annual general meeting of the company held on August 16, 1917, a resolution was passed "that the payment to each of the directors of a commission of two per cent. each on the whole amount guaranteed by each of them (10,000*l.*) to the company's bankers in respect of advances made and to be made to the company for a period of one year ending May 24, 1918, be sanctioned," and in due course the sum of 200*l.* was paid to each of the three directors by the company. In May, 1918, the company's turnover and commitments were still increasing and its financial difficulties were yet greater than in the preceding year. At a directors' meeting held on May 15,

1918, the managing director drew attention to the very large commitments of the company, amounting in all, with the April, May and June shipments of shellac purchased, to a sum of over 42,500*l.*, and to the impossibility of financing this without further assistance. After discussion it was resolved that the London City and Midland Bank be requested to increase the existing overdraft from 10,000*l.* to 20,000*l.* on the personal guarantee of the directors, and that in consideration of the directors giving their guarantee up to the increased amount for a further period not exceeding one year from May 24, 1918, when the terms of their existing guarantee expired, the directors be allowed and paid a commission of 2 per cent. each on the whole amount so guaranteed. The resolution was also subject to confirmation by the company in general meeting. The directors gave their joint and several guarantee for the repayment of the increased amount of 20,000*l.* to the bank accordingly, the arrangement was ratified by the annual general meeting of the company on August 22, 1918, and the directors were in due course paid the sum of 400*l.* each by the company.

Up to the date of the hearing of the appeals, the directors had not given notice to the bank to determine the guarantee, and the guarantee remained in force, but for a period of six months after the expiration of the years to which the assessment under appeal related the company's account at the bank had not been overdrawn. A further payment of commission had been made by the company to each of the directors in consideration of the continuance of the guarantee after May 24, 1919, but in fixing the amount of this commission account was taken of the fact that the guarantee had not been operative for the period of six months during which there was no overdraft, and the amount of the commission was reduced proportionately. The directors had not at any time a controlling interest in the company. Of the 30,000 1*l.* shares issued the respondent (the chairman) held only 200 shares, the managing director 1334 shares, and the third director, who was associated with the chairman and the managing director in the guarantee, 1940 shares.

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The respondent gave evidence which the Commissioners accepted that he was and had been for many years a practising solicitor, and as such he had acted for the executors of a former proprietor of the business now carried on by the company. He stated that he had accepted the office of chairman of the company following a suggestion made by a judge of the Chancery Division to watch over the interests of the executors and had guaranteed the overdraft reluctantly and with the sole object of protecting the interests of the company and the executors. He further stated that he had not given a guarantee on any other occasion. Objection had originally been taken on behalf of the Crown against the allowance of the commissions in question as a deduction in computing the profits of the company for the purpose of excess profits duty on the ground that they were increased remuneration of the directors within r. 5, Part I., Sch. IV., Finance (No. 2) Act, 1915, but on an appeal against assessments on the company to excess profits duty the Special Commissioners had allowed these commissions as an expense of the company's business. Subsequently assessments were made on the directors under Sch. E of the Income Tax Acts in respect of the commissions received by them, but the General Commissioners of Taxes for the Tower Division discharged the assessments under Sch. E on appeal on the ground that the commissions were not profits which accrued to the directors by reason of their office. The assessments under appeal were then made on the appellant under Sch. D of the Income Tax Acts.

It was contended on behalf of the respondent that the commissions received by the respondent were not profits of a trade, profession, employment or vocation carried on by him, and were not chargeable to income tax under Case 1 or Case 2 of Sch. D; and that the commissions were not annual profits or gains within the meaning of the Income Tax Acts or of Case 6 of Sch. D and arose from casual unsought and exceptional transactions and were not chargeable to income tax under that case or otherwise.

It was contended on behalf of the Crown (inter alia):

(*a*) that the commissions in question were profits of an employment or vocation exercised by the respondent and were chargeable to income tax under Case 2 of Sch. D; (*b*) alternatively, that the commissions were annual profits or gains chargeable to income tax under Case 6 of Sch. D.

The Commissioners who heard the appeal upheld the contentions of the respondent and discharged the assessments.

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The respondent in this case was another of the directors of C. W. Waters, Ld., who had received commission in return for his guarantee of the company's overdraft with its bankers under the circumstances already set out in *Ryall* v. *Hoare*. Apart from the difference in the name of the respondent the facts were the same, and the two cases were heard together.

Sir T. W. Inskip S.-G. and *R. P. Hills* for the appellant. The word "annual" is applied to "profits or gains" in Case 6 to distinguish profits or gains in the nature of income from mere capital realization. In *Attorney-General* v. *Black* (1) Martin B., referring to the corresponding Schedule in the former Act (5 & 6 Vict. c. 35, Sch. D), said: "The section then contains rules for ascertaining the duties in the particular cases mentioned in the section; and the sixth case which it gives is as follows: 'the duty to be charged in respect of any annual profits or gains not falling under any of the foregoing rules, and not charged by virtue of any of the other Schedules contained in this Act.' It seems almost impossible that any net could be extended more widely; every possible source of income seems included." The commissions here received were "profits or gains," and although "casual" are rightly assessed to income tax under Case 6.

Sir W. Finlay K.C. and *A. M. Bremner* for the respondents. The commissions did not come to the respondents qua directors, and if the appellants are right in their contention, any remuneration of the kind whether by contract or otherwise is assessable to income tax. Even if a guarantee were

(1) (1871) L. R. 6 Ex. 78, 85; affirmed by C. A. 308.

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given for a bank overdraft by a personal friend in return for a commission, income tax would be payable. This is not the case of the carrying on of a business. In *Assets Co.* v. *Inland Revenue* (1) Lord Young said in his judgment: "I should say that I have really no doubt that any person or any company making a trade of purchasing and selling investments will be liable in income tax upon any profit which is made by that trade. . . . . But it is another proposition altogether that, where no trade is carried on, a gain or loss upon the purchase and re-sale of property comes within the meaning of the Income Tax Acts." Here there is nothing in the nature of a business in commissions, but only a casual profit of a non-recurrent nature. The payment resembles the case of a gift, there being no "annual profit or gain." In *Beynon & Co.* v. *Ogg* (2), where it was sought to charge a firm of coal merchants with income tax under Sch. D upon profits made on an isolated purchase and sale of coal-waggons, Sankey J. said: "I do not think it is possible to say that the mere fact that it was an isolated transaction at once takes it out of the category of chargeable property. I think in most cases an isolated transaction does not fall to be chargeable," and he concludes that all the circumstances of the case must be considered. Schedule D is intended to apply to annually recurring profits or gains, the phrase "annual" being twice used in the Schedule; no principle of law can be formulated which will show the decision of the Commissioners to be wrong.

R. P. Hills in reply. The commissions received here were in the nature of income, and that distinguishes the case from *Assets Co.* v. *Inland Revenue* (1) and *Beynon & Co.* v. *Ogg.* (2) The profit here is not necessarily "casual": it resembles interest on money on deposit at the bank which is assessable. Mere gifts are not chargeable, because there is no legal obligation to pay and the sum paid has no connection with property. To bring a sum within the Sixth Case there must be property producing the assessment, or the sum received must be received for some legal consideration. In *Coman* v. *Governors*

(1) (1897) 34 S. L. R. 486; 3 Tax Cas. 542. (2) (1918) 7 Tax Cas. 125, 133.

of Rotunda Hospital, Dublin (1), where it was sought to charge profits derived from the letting of rooms for public entertainments, the judgments of the House of Lords (affirming the Irish Court of Appeal) show plainly that if the profits were not included in Case 1 they would have been within Case 6, which is described by O'Connor M.R. in the Irish Court of Appeal as " of the most sweeping drag-net character, bringing in all profits or gains not charged by any of the other Schedules."

Cur. adv. vult.

April 30. ROWLATT J. In these two cases the question for decision is whether two directors of a limited company who received sums by way of commission for guaranteeing the company's overdraft with its bankers are liable to be assessed to income tax under the Sixth Case of Sch. D in respect of those commissions. The Special Commissioners for Income Tax have discharged the assessment, and from their decision the Crown appeals.

The facts are that the company, which was in want of money at the time, asked the directors to give a personal guarantee to the company's bankers in consideration of an increase from 5000*l.* to 10,000*l.* in the company's overdraft. The directors, although unwilling to do this, ultimately consented. The transaction was not one in which the directors were interested as a matter of business, and one of them, who is a solicitor, declares that he never previously entered upon such a transaction and in all probability would never again do so. Therefore, although the circumstances are that they are men of affairs and that the company is engaged in business, in view of the facts found by the Special Commissioners and included in the case stated I must treat the case as if a person who was not connected with business at all received a commission from another person also not connected with business, in return for the favour of guaranteeing his account at a bank. In these circumstances are these commissions received as

(1) [1921] 1 A. C. 1; 7 Tax Cas. 517, 556.

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"annual profits or gains" under Case 6? Two kinds of emolument may be excluded from Case 6. First, anything in the nature of capital accretion is excluded as being outside the scope and meaning of these Acts confirmed by the usage of a century. For this reason, a casual profit made on an isolated purchase and sale, unless merged with similar transactions in the carrying on of a trade or business is not liable to tax. "Profits or gains" in Case 6 refer to the interest or fruit as opposed to the principal or root of the tree. The second class of cases to be excluded consists of gifts and receipts, whether the emolument is from a gift inter vivos, or by will, or from finding an article of value, or from winning a bet. All these cases must be ruled out because they are not profits or gains at all. Without giving an exhaustive definition, therefore, we may say that where an emolument accrues by virtue of service rendered whether by way of action or permission, such emoluments are included in "Profits or gains." Assuming then that these commissions constitute "profits or gains," the further question for consideration is whether they are "annual" profits or gains. The word "annual" may mean "annually recurring," as applied to the seasons of the year, or "recurring over a long period of years": or it may mean "lasting only for one year," as we speak of certain flowers as annuals which must be sown afresh every year: or, as in the case of interest on a sum of money, it may mean "calculated with reference to a year." In the present case the transaction did last for a year and was renewed for another year, although it did not so continue of its own accord, but by agreement between the parties. I do not think that any of those meanings are applicable to the word "annual" as used in Case 6. Now one is not entirely left without guidance, at any rate as a matter of practice. It has been recognized that if a furnished house is let even for a few weeks during the season in any one year, the letting will attract income tax under Case 6 on the profit so made: the principle of this has never been ruled upon by decision of the Courts, but it has been tacitly assumed that this is so by the Courts in Scotland, and I do not think it is

now open to a Court of first instance, at any rate, to say that this practice is wrong. The letting in such a case is not recurring yearly, nor does it last for a year, nor is it calculated with reference to a year, but only with reference to the requirements of a few weeks. Similarly when a person is appointed for a few weeks to an office to perform some services not in the nature of a trade or business in consideration of a lump sum (as for instance a Judge's marshal) income tax is deducted. Nor does it afford a clear explanation of this to say that the servant is taxed in such cases as being the holder of an "office"; for the tax on an office is calculated on the annual amount of profits. The word "annual" here can only mean "calculated in any one year," and "annual profits or gains" mean "profits or gains in any one year or in any year as the succession of years comes round."

This case raises the whole question of the meaning of the expression "casual profits." I have already referred to the case of the letting of a furnished house, and other illustrations were referred to in the course of argument. I need only mention the case of casual authorship, as where a person who is neither a journalist nor an author by profession is called in by a firm of publishers to write a single book or a single article for reward. There again the amount which it is sought to tax is an instance of casual profits, but yet is liable to tax under Case 6 in the same way as the rent received in the letting of a furnished house, or as the commissions paid to the directors who gave the guarantee in the present case.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Lewis & Sons.*

F. P. F.

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June 11.

ATTORNEY-GENERAL *v.* PARR AND OTHERS.

Revenue—Estate Duty—Aggregation of Estates—Tenant for Life under Will—Disentailing Deed and Resettlement—New Life Estate in Restoration and by way of Confirmation of Life Estate under Will—Property passing on Death of Tenant for Life—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 4—*Finance Act*, 1900 (63 *Vict. c.* 7), *s.* 12, *sub-s.* 2—*Finance Act*, 1907 (7 *Edw.* 7, *c.* 13), *s.* 16.

Under the will of the testator, who died in 1870, real estate was devised to the use of A. for life and after his death to the use of his sons successively in tail male. On November 4, 1895, A. and his son B., then tenant in tail, concurred in executing a disentailing assurance conveying the property to a grantee to hold to such uses as A. and B. should jointly appoint. By a resettlement dated December 19, 1895, the property was appointed and conveyed to such uses as A. and B. should jointly appoint and in default of appointment to the use of A. for life by way of restoration and confirmation of his life estate under the testator's will, and subject thereto to the use of B. for life with remainder to the use of his sons successively in tail male. A. died in 1920 possessed in his own right of real and personal estate. The Crown claimed that on A.'s death his own estate and the settled property fell to be aggregated under s. 4 of the Finance Act, 1894, so as to form one estate for the purposes of estate duty. The defendants contended that the settled property passed on the death of A. not under the resettlement but under the will of the testator, who died before August 1, 1894, and that by virtue of s. 12, sub-s. 2, of the Finance Act, 1900, and s. 16 of the Finance Act, 1907, the settled property did not fall to be aggregated with A.'s own estate, but was liable to estate duty as an estate by itself:—

Held, that the two estates fell to be aggregated, as the settled property passed on A.'s death not under the testator's will but under the resettlement.

In re Constable's Settled Estates [1919] 1 Ch. 178 applied.

INFORMATION on behalf of the Crown.

Thomas Parr (hereinafter called "the testator") by his will dated July 1, 1869, devised his Grappenhall and Appleton estate, in the county of Chester, to the use of his son Joseph Charlton Parr for life with remainder to the use of his sons successively in tail male with remainders over. The will also gave Joseph Charlton Parr powers of jointuring and of raising portions for his children.

The testator devised his residuary real estate to the use of his trustees upon trust, subject to a term, for his son Thomas Philip Parr for his life with remainder to the use of his sons

successively in tail male and in default of such issue in trust for the said Joseph Charlton Parr for his life with remainder to his sons successively in tail male. The testator empowered every tenant for life to appoint to his wife a yearly rentcharge not exceeding 1500*l.*

The testator died on January 6, 1870, without having revoked or (so far as material) altered his will.

By his marriage settlement dated February 5, 1872, Joseph Charlton Parr charged the Grappenhall and Appleton estate with a jointure of 600*l.* in favour of his wife Jessie Maria Parr, and by the same indenture he charged the same estate with portions for the younger children of the marriage.

There was issue of the marriage of Joseph Charlton Parr and Jessie Maria Parr, the defendant Roger Charlton Parr, born on November 3, 1874, and three daughters.

Upon the death of Thomas Philip Parr on October 29, 1891, without issue but leaving a widow, Agnes Darby Parr, to whom he appointed a jointure of 1500*l.*, Joseph Charlton Parr became tenant for life of the testator's residuary real estate subject to the rentcharge in favour of Agnes Darby Parr, and also of the testator's residuary personal estate subject to certain legacies, and subject thereto and to Jessie Maria Parr's jointure and the portions for the younger children of Joseph Charlton Parr, the defendant Roger Charlton Parr became tenant in tail male of the testator's residuary real and personal estate.

By an indenture (hereinafter called "the disentailing deed") dated November 4, 1895, and duly enrolled, Joseph Charlton Parr and Roger Charlton Parr, with the consent of Joseph Charlton Parr as protector of the settlement, conveyed to Alan Lister Kaye and his heirs all the hereditaments devised by the testator's will and also (by way of conveyance and not of exception) all the other hereditaments which had by purchase or otherwise become subject to the subsisting uses or trusts of the testator's will or of which Roger Charlton Parr then was tenant in tail male or in tail at law or in equity, and also all the moneys, stocks, etc., which then were or might be or become liable to

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be invested in the purchase of hereditaments to be settled to such of the uses declared by the will concerning the testator's residuary real estate or the Grappenhall and Appleton estate, to hold all the said premises unto the said Alan Lister Kaye and his heirs (subject to the said jointures and portions), but freed and discharged from all estates in tail male or in tail of Roger Charlton Parr and all estates, etc., to take effect after the determination or defeasance of such estate in tail male or in tail or any of them to such uses as Joseph Charlton Parr and Roger Charlton Parr should jointly appoint.

By an indenture (hereinafter called "the resettlement") dated December 19, 1895, made between Joseph Charlton Parr of the first part, Roger Charlton Parr of the second part, and Henry Bingham Parr and Alan Lister Kaye of the third part, after reciting (inter alia) that Joseph Charlton Parr and Roger Charlton Parr had agreed to make the settlement thereinafter contained, it was witnessed that Joseph Charlton Parr and Roger Charlton Parr in exercise of the power given to them by the disentailing deed as settlors jointly appointed the various properties described in the schedules thereto (except those parts of the hereditaments which had been purchased by Joseph Charlton Parr since the testator's death) subject to the aforesaid jointures and portions, to the uses upon the trusts and with and subject to the powers and provisions thereinafter declared and contained and it was by the resettlement also witnessed that in pursuance of the said agreement Joseph Charlton Parr as settlor granted and conveyed to the said Henry Bingham Parr and Alan Lister Kaye and their heirs all and singular the hereditaments known as the Staunton Park estate of which he was seised in fee simple and also the hereditaments purchased by him, Joseph Charlton Parr, since the testator's death and of which he was seised in fee simple to hold all the said premises to the said Henry Bingham Parr and Alan Lister Kaye and their heirs to the uses upon the trusts and with and subject to the powers and provisions thereinafter declared.

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By the resettlement it was agreed and declared that the Staunton Park estate should (subject to certain mortgages) remain and be to such uses upon such trusts and with and subject to such powers and provisions as Joseph Charlton Parr should by deed or will appoint and that all the premises thereinbefore appointed should (subject as to such of them as were subject thereto to the said rentcharges and portions) thenceforth remain and be to such uses upon such trusts and with and subject to such powers and provisions as Joseph Charlton Parr and Roger Charlton Parr should jointly appoint and that in default of appointment all the said premises thereinbefore appointed granted and conveyed (including the Staunton Park estate) should remain and be to the use that Roger Charlton Parr should receive thereout during the joint lives of himself and Joseph Charlton Parr a certain rentcharge and subject thereto to the use of Joseph Charlton Parr for his life without impeachment of waste by way of restoration and confirmation of his then present life estate under the testator's will together with all the then existing powers under the will of jointuring any aftertaken wife and all his then existing powers of charging portions for his younger children so far as the same had not been already exercised and all powers of leasing and sale annexed to or exercisable during the continuance of such life estate under or by virtue of the testator's will or the Settled Land Acts or otherwise and which immediately before the execution of the disentailing deed were capable of being exercised, with remainder to the use that the said Jessie Maria Parr should receive during her life, if she survived Joseph Charlton Parr, a rentcharge of 1000*l.* a year (in addition to that created by the marriage settlement) and subject thereto to such uses as Roger Charlton Parr should by deed or will appoint and in default of appointment to the use of Roger Charlton Parr for his life with remainder to his sons successively in tail male with remainders over.

The information alleged that the joint effect of the disentailing deed and the resettlement was (1.) to destroy and extinguish the life estate of Joseph Charlton Parr and

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all estates in remainder thereon which before the execution of these instruments subsisted by virtue of the testator's will, and (2.) to create an entirely new life interest in Joseph Charlton Parr in the Grappenhall and Appleton estate and the residuary real and personal estate of the testator with remainders over as in the resettlement expressed.

Joseph Charlton Parr died on February 27, 1920, and the information alleged that under and by virtue of the resettlement the property appointed by or comprised therein (except certain parts thereof which had been conveyed to Roger Charlton Parr by appointments made in 1897, 1898, 1901 and 1906 as supplemental to the resettlement) passed upon his death subject to the jointure rentcharges and portions.

Joseph Charlton Parr died seised or possessed in his own right of real and personal estate of great value. This real and personal estate is hereinafter called "the free estate."

The information alleged that upon the death of Joseph Charlton Parr estate duty became payable in respect of the free estate and the settled property, and that by virtue of s. 4 of the Finance Act, 1894, the free estate and settled property were, for determining the rate of estate duty, to be aggregated so as to form one estate, and the information prayed for a declaration to that effect.

By their answer the defendants contended that the settled property passed on the death of Joseph Charlton Parr not under the resettlement but under the will of the testator who died before August 1, 1894, and that by virtue of s. 12, sub-s. 2, of the Finance Act, 1900, and s. 16 of the Finance Act, 1907, the settled property did not fall to be aggregated with the free estate but was liable to estate duty as an estate by itself.

Sir Douglas Hogg A.-G. and *Sheldon* for the Crown. The question is whether the settled property in question passed on the death of Joseph Charlton Parr under the will of the testator or whether it passed under the resettlement.

If it passed under the former, it is to be treated as an estate by itself, inasmuch as the testator died before the commencement of Part I. of the Finance Act, 1894 : see s. 12, sub-s. 2, of the Finance Act, 1900 (1), and s. 16 of the Finance Act, 1907 (2) ; if, on the other hand, the settled property passed, not under the will of the testator, but under the resettlement, it falls to be aggregated with the free estate so as, for estate duty purposes, to form one estate : s. 4 of the Finance Act, 1894. (3) Here Joseph Charlton Parr held under the resettlement. The dispositions made by the testator's will were conveyed away by the resettlement and fresh estates created thereby. The clause inserted in the resettlement that the life estate given to Joseph Charlton Parr was by way of restoration and confirmation of his life estate under the will was ineffectual to restore the original life estate when the operative words were sufficient to pass it : *In re Constable's Settled Estates* (4), where the Court of Appeal decided under very similar circumstances that the tenant for life held under the resettlement and not under the will. That decision governs the present case.

(1) Finance Act, 1900, s. 12, sub-s. 2 : " Where settled property passes, or is deemed to pass, on the death of a person dying after the passing of this Act under a disposition made by a person dying before the commencement of Part I. of the Finance Act, 1894 [August 1, 1894], and such property would, if the disponer had died after the commencement of the said Part, have been liable to estate duty upon his death, the aggregation of such property, with other property passing upon the first-mentioned death, shall not operate to enhance the rate of duty payable either upon the settled property or upon any other property so passing by more than one-half per cent. in excess of the rate at which duty would have been payable if such settled property had been treated as an estate by itself."

(2) Finance Act, 1907, s. 16 : " In the case of persons dying on or after April 19, 1907, any settled property which would under sub-s. 2 of s. 12 of the Finance Act, 1900, be aggregated with other property so as to enhance the rate of duty to the limited extent provided in that section, shall, for the purposes of the principal Act, instead of being so aggregated, be treated as an estate by itself."

(3) Finance Act, 1894, s. 4 : " For determining the rate of estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which estate duty is leviable shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof. . . . ."

(4) [1919] 1 Ch. 178.

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[They also referred to *In re Cope and Wadland's Contract* (1) and *In re Meeking.* (2)]

Maugham K.C. and *J. H. Stamp* for the defendants. In dealing with this question the substance and not the form of the transaction has to be regarded. In substance the settled estate passed under the will of the testator and not under the resettlement, as the life estate which Joseph Charlton Parr enjoyed under the latter instrument was for all practical purposes the same as that he previously had. A disentailing deed does not alter the identity of the estate with which the parties are concerned: *Lord Lilford* v. *Attorney-General* (3); *Duke of Northumberland* v. *Attorney-General.* (4) In *In re Constable's Settled Estates* (5), which is relied upon by the Crown, the question was whether the particular person was tenant for life under the resettlement so as to be able to exercise the extended powers under it. The case turned on a consideration of the Settled Land Acts, which are extremely technical, in this respect being totally different from s. 12, sub-s. 2, of the Finance Act, 1900, on which the present question turns where the language is not technical. In a series of cases under the Succession Duty Act the House of Lords decided that the resettlement did not determine who the predecessor was: see *Lord Braybrooke* v. *Attorney-General* (6); *Attorney-General* v. *Floyer* (7); and *Attorney-General* v. *Smythe.* (8) Those cases are directly in point.

ROWLATT J. While I fully appreciate the argument addressed to me on behalf of the defendants I cannot see its application to this case. The Succession Duty Act imposed a duty upon a succession, that is, upon the interest taken by the successor, and it therefore became necessary under that Act to ascertain in each case from whose estate the interest of the successor was derived. The answer to that question showed who was the predecessor. Estate duty is entirely

(1) [1919] 2 Ch. 376.
(2) [1922] 2 Ch. 523.
(3) (1867) L. R. 2 H. L. 63.
(4) [1905] A. C. 406, 410.
(5) [1919] 1 Ch. 178.
(6) (1861) 9 H. L. C. 150.
(7) (1862) 9 H. L. C. 477.
(8) (1862) 9 H. L. C. 497.

different from succession duty, and the point with which this case is concerned turns upon the aggregation of all the property which the deceased ceased by his death to enjoy, from whomsoever it came and to whomsoever it went on his death. From the liability to aggregation there is an exception, and that is what gives rise to the present controversy. That exception requires me to identify, not the predecessor from whose interest any one's is derived, but the disposition under which the property on his death passes. I have to identify the instrument under which while he lived he had the property and under which when he died it goes. In view of the decision of the Court of Appeal in *In re Constable's Settled Estates* (1) I cannot possibly say that it is under the will of the testator who died in 1870 that the property in question passes. Applying what the Court of Appeal there said to the facts of this case, I hold that the estate which Joseph Charlton Parr was enjoying at the moment before his death was conferred upon him by the resettlement, and when he died it was the resettlement that sent it over. The Court of Appeal decided that in terms. Of course it is technical. As is said, from the popular point of view the estate passed under the testator's will. That may be true, but the section drives me to something more precise, and my decision is really prescribed for me by that of the Court of Appeal. I must therefore find for the Crown.

Judgment for Crown.

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for defendants: *Balderston, Warren & Co., for Robert Davies & Co., Warrington.*

(1) [1919] 1 Ch. 178.

J. S. H.

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April 19, 20.

RYALL, APPELLANT *v.* HART, RESPONDENT.

Local Government—Housing of Working Classes—Fitness of House for Human Habitation—Notice by Local Authority requiring Execution of Work—No Appeal by Owner to Minister of Health—Work done by Local Authority—Demand for Payment—Jurisdiction of Magistrate to consider reasonableness of Notice—Housing of the Working Classes Act, 1890 (53 *&* 54 *Vict. c.* 70), *Part II.—Housing, Town Planning, &c., Act*, 1909 (9 *Edw.* 7, *c.* 44), *s.* 15—*Housing, Town Planning, &c., Act*, 1919 (9 *&* 10 *Geo.* 5, *c.* 35), *s.* 28—*Ministry of Health Act*, 1919 (9 *&* 10 *Geo.* 5, *c.* 21), *s.* 3.

A notice under s. 28, sub-s. 1, of the Housing, Town Planning, &c., Act, 1919, was served by a local authority upon the owner of a house requiring him to execute within a specified time certain work in order to make the house reasonably fit for human habitation. The notice not having been complied with, the local authority did the work required to be done. Proceedings were subsequently taken against the owner under s. 28, sub-s. 3, of the Act of 1919 before a Court of summary jurisdiction to recover the expenses incurred by the local authority:—

Held, that the owner was entitled to raise before the Court of summary jurisdiction the question whether the notice was a reasonable notice notwithstanding that he could have appealed to the Minister of Health under s. 15, sub-s. 6, of the Housing, Town Planning, &c., Act, 1909, against the notice requiring him to do the work and omitted to do so within the time prescribed by that section.

SPECIAL CASE stated by a metropolitan police magistrate.

The appellant, Frederick Ryall, was the Town Clerk to the Council of the Metropolitan Borough of Bermondsey (hereinafter referred to as "the Council"). The respondent, Joseph Henry Hart, was the owner, within the meaning of s. 28 of the Housing, Town Planning, &c., Act, 1919 (1), of a

(1) The Housing, Town Planning, &c., Act, 1909, s. 15, sub-s. 1: "The last foregoing section shall, as respects contracts to which that section applies, take effect as if the condition implied by that section included an undertaking that the house shall, during the holding, be kept by the landlord in all respects reasonably fit for human habitation."

Sub-s. 3: "If it appears to the local authority within the meaning of Part II. of the principal Act [the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70)] that the undertaking implied by virtue of this section is not complied with in the case of any house to which it applies, the authority shall, if a closing order is not made with respect to the house, by written notice require the landlord, within a reasonable time, not being less than twenty-one days, specified in the notice, to execute such work as the authority shall specify in the notice as being necessary to make the house in all respects reasonably fit for human habitation."

Sub-s. 6: "A landlord may appeal

large number of houses to which the provisions of the section applied situated in the district of which the Council were the local authority under the said section.

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to the Local Government Board against any notice requiring him to execute works under this section, and against any demand for the recovery of expenses from him under this section or order made with respect to those expenses under this section by the authority, by giving notice of appeal to the Board within twenty-one days after the notice is received, or the demand or order is made, as the case may be, and no proceedings shall be taken in respect of such notice requiring works, order, or demand, whilst the appeal is pending."

The Housing, Town Planning, &c., Act, 1919, s. 28, sub-s. 1: "If the owner of any house suitable for occupation by persons of the working classes fails to make and keep such house in all respects reasonably fit for human habitation then, without prejudice to any other powers, the local authority may serve a notice upon the owner of such house requiring him within a reasonable time, not being less than twenty-one days, specified in the notice, to execute such works as may be necessary to make the house in all respects reasonably fit for human habitation.

"Provided that, if such house is not capable without reconstruction of being rendered fit for human habitation, the owner may, within twenty-one days after the receipt of such notice, by written notice to the local authority declare his intention of closing the house for human habitation, and thereupon a closing order shall be deemed to have become operative in respect of such house. Any question arising under this proviso shall, in case of difference between the owner and the local authority, be determined by the Local Government Board."

Sub-s. 2: "If the notice of the local authority is not complied with, the local authority may:—

(*a*) At the expiration of the time specified in that notice if no such notice as aforesaid has been given by the owner; and

(*b*) At the expiration of twenty-one days from the determination by the Local Government Board if such notice has been given by the owner, and the Local Government Board have determined that the house is capable without reconstruction of being made fit for human habitation;

do the work required to be done."

Sub-s. 3: "Any expenses incurred by the local authority under this section may be recovered in a court of summary jurisdiction, together with interest at a rate not exceeding five pounds per centum per annum from the date of service of a demand for the same till payment thereof from the owner, and until recovery of such expenses and interest the same shall be a charge on the premises. . . . ."

Sub-s. 6: "This section shall be deemed to be part of Part II. of the principal Act."

Sect. 39, sub-s. 2: "Sections 14 and 15 of the Housing, Town Planning, &c., Act, 1909, shall be deemed to be part of Part II. of the principal Act."

Sect. 40: "This Part of this Act shall be construed as one with the principal Act, and any provisions of this Part of this Act which supersede or amend any provisions of the

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On September 22, 1920, the Council, as the local authority under the said section, served on the respondent, as the owner under the said section, a notice in respect of No. 3 Canute Street in the borough, to which house the provisions of the section applied, requiring the respondent to execute the work specified in the notice within a period of twenty-one days, being the minimum period permitted by the section.

The respondent did none of the work specified in the notice, and the Council thereupon, purporting to act under sub-s. 2 (*a*) of s. 28, executed the work themselves at a cost of 16*l.* 15*s.* 10*d.*, the work being commenced on December 20, 1920, and finished on January 19, 1921.

On February 16, 1921, the Council served a demand upon the respondent for the said expenses, and in default of payment a complaint was made and a summons taken out under sub-s. 3 of s. 28 to recover such expenses. That complaint was heard on September 21, 1922.

The respondent resisted the claim before the magistrate on the ground that the notice did not provide a reasonable time for the execution of the work, and he contended that in considering whether or not such time was reasonable the magistrate ought to consider all the circumstances of the case, and particularly (*a*) that he was the owner of a large number of houses in Bermondsey to which s. 28 applied; (*b*) that a number of other notices under s. 28 and also under the Public Health (London) Act, 1891, had recently been served upon him, which made it very difficult to proceed with all the work at once.

It was submitted on behalf of the Council that the question of the reasonableness of the time specified in the notice was not a matter for the jurisdiction of the magistrate, the

principal Act shall be deemed to be part of that Part of the principal Act in which the provisions superseded or amended are contained, and references in this Part of this Act to the principal Act or to any provision of the principal Act shall be construed as references to that Act or provision as amended by any subsequent enactment, including this Part of this Act; . . . ."

The Ministry of Health Act, 1919 (9 & 10 Geo. 5, c. 21), s. 3, sub-s. 1: "There shall be transferred to the Minister [of Health] (*a*) all the powers and duties of the Local Government Board. . . . ."

respondent having failed to exercise his right of appeal to the Minister of Health either against the time or requirements specified in the notice or against the amount of the said expenses, and the attention of the magistrate was directed on behalf of the Council to the decision in *Rex* v. *Minister of Health*. (1)

The magistrate held, having regard to the decision in *Ryall* v. *Cubitt Heath* (2), that the question of the reasonableness of the time specified in the notice was a matter for his jurisdiction. He found that the respondent could not by any reasonable effort or diligence have complied with the notice. He held that the period of twenty-one days specified in the notice was not in all the circumstances a reasonable time; that the notice was accordingly invalid, and he therefore dismissed the complaint.

The question for the opinion of the Court was whether the magistrate, in dismissing the summons upon the facts stated, came to a correct determination in point of law.

Harney K.C. and *Eddy* for the appellant. The notice which the Borough Council served upon the respondent requiring him to do the work specified in the notice within twenty-one days was served in pursuance of s. 28, sub-s. 1, of the Housing, Town Planning, &c., Act, 1919. Under sub-s. 2 if the notice is not complied with the local authority may at the expiration of the time specified do the work required to be done, and under sub-s. 3 the local authority may recover in a Court of summary jurisdiction any expense incurred by them under the section. Sub-s. 6 provides that the section is to be deemed to be part of Part II. of the principal Act of 1890 which deals with unhealthy dwelling houses and closing orders. The right of appeal under the proviso to sub-s. 1 of s. 28 is limited to cases where the question is whether the house is capable of being rendered fit for human habitation without reconstruction. But s. 15, sub-s. 6, of the Housing, Town Planning, &c., Act, 1909, gave the landlord a right of appeal to the Local Government Board, now under

(1) [1922] 2 K. B. 28. (2) [1922] 1 K. B. 275.

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s. 3, sub-s. 1, of the Ministry of Health Act, 1919, to the Minister of Health, not only against any notice by a local authority requiring him to execute works thereunder but also against any demand for the recovery of expenses. Sect. 15 of the Act of 1909 is by s. 39, sub-s. 2, of the Act of 1919 to be deemed to be part of Part II. of the principal Act of 1890. Sect. 40 of the Act of 1919 provides that Part I. of that Act, which includes s. 28, shall be construed as one with the principal Act, and that any provisions of that Part of the Act of 1919 which supersede or amend any provisions of the principal Act shall be deemed to be part thereof. The result is that both s. 15 of the Act of 1909 and s. 28 of the Act of 1919 are incorporated in the existing legislation. It was held in *Rex* v. *Minister of Health* (1) that the right of appeal given to a landlord by s. 15, sub-s. 6, of the Act of 1909 to the Local Government Board was not impliedly repealed or superseded by the proviso to sub-s. 1 of s. 28 of the Act of 1919 and that that proviso only gives an additional appeal in a particular case. The result is that the appeal to the Local Government Board, now to the Minister of Health, under the earlier provision remains in force. These Acts must be read as a code under which the only right of appeal against a notice to execute work is that given by s. 15, sub-s. 6, of the Act of 1909—namely, to the Minister of Health. The notice must under s. 28 of the Act of 1919 specify at least twenty-one days within which the landlord is required to do the work, and twenty-one days is the period of time under s. 15, sub-s. 6, of the Act of 1909 within which a landlord may appeal to the Minister of Health, and during that time no proceedings may be taken. If however that time is allowed by the owner to go by and he neither appeals to the Minister nor complies with the notice the local authority can do the work required to be done, and recover the expenses before a Court of summary jurisdiction. When those proceedings to recover the expenses are taken the Court of summary jurisdiction is not entitled to take into consideration the reasonableness of the notice served by the local authority; the functions of the Court

(1) [1922] 2 K. B. 28.

are purely ministerial to give judgment for the amount of the expenses incurred by the local authority. It would be unreasonable for an owner to stand by and allow a local authority to incur expense in doing the work, and when he is sued by the local authority to recover the expenses so incurred by them for him to be allowed to raise the question as to the reasonableness of the notice served upon him. The owner is estopped from raising that point before the Court of summary jurisdiction if he did not appeal to the Minister of Health within the prescribed time. It is true that the Divisional Court held in *Ryall* v. *Cubitt Heath* (1) that in proceedings by a local authority under s. 28, sub-s. 3, of the Act of 1919 the Court of summary jurisdiction were entitled to determine whether the local authority had complied with the conditions laid down by s. 28, and to decide whether having regard to all the circumstances of the case the notice was a reasonable notice or not. In that case however the fact that an appeal against the notice was given by s. 15, sub-s. 6, of the Act of 1890 to the Local Government Board was not put before the Court as a substantive argument, one side contending that the statutes prior to the Act of 1919 had no bearing on the case while the other side contended that the owner's right of appeal lay to quarter sessions. Moreover the decision in that case is inconsistent with the reasoning for the decision in *Rex* v. *Minister of Health* (2), in which case *Ryall* v. *Cubitt Heath* (1) was not even referred to.

W. E. Batt for the respondent was not called upon.

LORD HEWART C.J. having stated the facts continued: It is to be observed that under s. 15, sub-s. 6, of the Act of 1909 a full opportunity of appeal to the Department is given to the landlord; he may appeal against the notice and also against the demand for the recovery of the expenses. In those circumstances the argument on behalf of the appellant before the magistrate and repeated before us is that upon the true construction of this mosaic of legislation the owner

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has an appeal to the Minister of Health with regard to the reasonableness of the time specified in the notice and that it is only by means of that machinery that he can question the reasonableness of the time specified. The argument is that it is extremely convenient that the appeal, and the only appeal, on the question of the reasonableness of the time should be limited to the period of twenty-one days, because that is the period specified by the statute as the minimum period for the notice. It is said that the intention of the Legislature was that if the owner upon whom the notice was served intended to raise a question as to the reasonableness of the time specified in the notice he ought to act within those twenty-one days, and that it would be wrong and unreasonable that he should be permitted to sit still during those twenty-one days and permit the local authority to proceed with and complete the work and then when that expense had been incurred raise a point going to the foundation of the whole matter, with the result that work done upon his property would be done at the expense of his fellow ratepayers. There may be much to be said for the reasonableness of the argument. On the other hand, the question which this Court has to consider is what is it that these statutes have provided ? If a condition precedent is prescribed by the statute for the validity of a notice it is a strong thing to say that the question whether or not that condition precedent has been fulfilled cannot be raised before the magistrate merely because the owner is given a right of appeal to a Government Department. In my opinion if it was intended by the statute not merely to provide an appeal to the Government Department in that respect but also to prevent that question being raised at any other time or by any other method, it might have been expected that that intention would be expressed in clear terms in the statute. That however has not been done. If one has regard to the argument based upon intrinsic reasonableness there appears to be a serious flaw in it from the point of view of the present appellant. The argument is, that a question going to the root of the matter must be raised within twenty-one days of the notice being served and must

also be raised by appeal to the Minister of Health or not at all. But it is apparent if one looks at s. 15, sub-s. 6, of the Act of 1909 that the owner may appeal to the Minister of Health against the demand for the recovery of expenses as well as against the notice requiring the work to be done, and it was conceded in argument by counsel for the appellant that the owner might in his appeal against the demand for the recovery of expenses raise before the Minister of Health the question whether the time specified in the notice at the outset was a reasonable time; in other words, it is admitted that if one looks only at the possible appeals to the Ministry itself the question as to the reasonableness of the time specified in the notice is not to be concluded by the lapse of twenty-one days. This, or a cognate, matter has been previously considered by this Court. No small part of the argument in the present case for the appellant was that there was a manifest conflict between two decisions of this Court: *Ryall* v. *Cubitt Heath* (1) and *Rex* v. *Minister of Health*. (2) In the first of those cases the argument developed in the present case was not put forward as a substantive argument, in other words, the point was not taken in that case that by the combined operation of the Act of 1909 and the Act of 1919 the owner had the opportunity of appealing to the Ministry of Health against the notice served upon him by the local authority. When one looks at *Rex* v. *Minister of Health* (2) it would appear that *Ryall* v. *Cubitt Heath* (1) was not referred to. Those appear to be the facts, but it by no means follows for these reasons that the two cases are in conflict. Undoubtedly they are in conflict if the argument advanced on behalf of the present appellant is right, but not if side by side with the opportunity of appeal to the Ministry of Health afforded by the statute there are also certain opportunities left to the owner of raising the question as to the reasonableness of the notice before the magistrate. If one is to speak of intrinsic reasonableness, for my own part I see no difficulty in regarding as reasonable the concurrence of these two kinds of opportunities: they are not the same

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although they are similar. In the case of an appeal to the Ministry of Health the initiative lies with the owner when he receives the notice, and he may at once raise before the Ministry of Health the contention that the time specified is not a reasonable time, and if that is to be his contention it may be convenient both for him and for the local authority that the question should then be raised. Again, when the demand for the expenses incurred by the local authority is made and before proceedings are instituted to recover the money in a Court of summary jurisdiction it is once more open to the owner by taking the initiative to appeal to the Ministry of Health and raise various questions. The fact that these convenient appeals are provided by the statute on the initiative of the owner does not appear to me to be in the least fatal to the contention that if the owner refrains from making use of these opportunities or either of them he may nevertheless, when proceedings are instituted in a Court of summary jurisdiction to recover the expenses incurred by the local authority, take the point before the magistrate that the conditions precedent to the right of the local authority to recover those expenses have not been fulfilled. In *Ryall* v. *Cubitt Heath* (1) it was held by this Court that a Court of summary jurisdiction, when proceedings were instituted to recover expenses incurred under s. 28, sub-s. 3, was a proper tribunal to determine whether the local authority had complied with the conditions laid down in the earlier sub-section of s. 28. It was remarked in more than one of the judgments that the giving of a reasonable notice was a condition precedent. For example, Sankey J. said (2): "I read s. 28, sub-s. 1, as laying it down that a notice requiring the work to be done within a reasonable time is a condition precedent to the Council taking steps under sub-s. 3; and I think they have to prove that such notice was given, and, for the reasons which I have endeavoured to give, that the magistrate had a right to inquire into the reasonableness of it." That then is an affirmative decision that the question may be raised before the magistrate and that when it is raised the magistrate

(1) [1922] 1 K. B. 275. (2) [1922] 1 K. B. 287.

has a right to determine it. *Rex* v. *Minister of Health* (1) is also an affirmative decision. There the argument was advanced—and curiously enough on behalf of the Minister of Health himself—that there was no right of appeal to the Minister of Health except the limited right of appeal given by the proviso to sub-s. 1 of s. 28 of the Act of 1919. That section gave a right of appeal limited to a particular case, and the argument was that because that limited right of appeal was in terms given the effect of the enactment was by implication to supersede the right of appeal conferred by s. 15, sub-s. 6, of the Act of 1909. This Court held that that was not the effect of s. 28, sub-s. 1, but that the right of appeal mentioned in s. 15, sub-s. 6, of the Act of 1909 still remained, and that it was supplemented, not superseded, by s. 28 of the Act of 1919. Once more therefore the Court came to an affirmative decision that there was a right of appeal to the Ministry. Reading the two decisions together therefore one finds this result, that the question whether the time specified in the notice was reasonable, or, in other words, the question whether the condition precedent has been fulfilled is a question that may be entertained and decided by the magistrate to whom application is made for an order for the payment of expenses incurred by the local authority under the Act; and the later case decided that such a question, and other questions also, may be raised by appeal to the Ministry of Health. For myself I see no repugnancy between the two decisions; the one supplements the other; they are manifestly reconcilable if the true view is that there is not only an appeal to the Ministry of Health but also, upon certain matters at any rate, an opportunity of raising the question of law before the magistrate. It is unnecessary for the present case to enter into the question whether the boundaries, if I may so call them, of these opportunities of appeal, or of raising the questions, exactly coincide. I express no opinion upon the matter, but there seems to be ground for thinking that the questions which may be raised before the Ministry of Health upon appeal may be somewhat wider

(1) [1922] 2 K. B. 28.

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than the questions which may be raised before the magistrate. For example, it does not appear that an owner could raise before the magistrate in proceedings instituted for enforcing payment of expenses incurred by the local authority the point that the work required by the local authority was unnecessary. But this case is not concerned with questions of that nature. This case is concerned only with the point whether the reasonableness of the time specified in the notice may be called in question before the magistrate, or, as the judgment in *Ryall* v. *Cubitt Heath* (1) put it, whether the defendant to these proceedings before the magistrate may take the point that the condition precedent had not been fulfilled. The magistrate thought that the point could be taken. I think that his decision was correct, and that the point is not impaired in any way by the fact which is now established that the same matter might be the subject of an appeal to the Ministry of Health. For these reasons this appeal should, I think, be dismissed.

SHEARMAN J. I am of the same opinion. As however it is possible that this case may be taken elsewhere I think I ought to state shortly the reasons for my decision. It would be sufficient for the purposes of this case to say that the magistrate decided the case rightly because this Court in *Ryall* v. *Cubitt Heath* (1) expressly decided the point, and as I think decided it rightly. I desire however to consider the question independently of authority.

The summons in the present case was issued under s. 28 of the Housing, Town Planning, &c., Act, 1919. Under that section a local authority may serve a notice upon the owner of a house suitable for occupation by persons of the working classes and which he has failed to keep fit for human habitation, requiring him within a reasonable time to execute certain works. If this notice is not complied with the local authority may do the work required to be done and any expenses incurred by them under the section may be recovered in a Court of summary jurisdiction. I think that the meaning

(1) [1922] 1 K. B. 275.

of the section is that it is the duty of the local authority to serve a notice in which a reasonable time is specified within which the owner is to do the work required, and that if the local authority do the work themselves and then seek to recover in a Court of summary jurisdiction the expenses incurred by them the magistrate must decide whether the local authority served a notice upon the owner, whether it was a reasonable notice—namely, whether it specified a reasonable time within which the owner was to do the work, and whether the local authority entered and did the work themselves. It is now said that the owner might have appealed to the Minister of Health against the notice, and because he did not do so within the time specified he has lost the right of appeal and the right to question the validity of the notice before the magistrate. I think that *Rex* v. *Minister of Health* (1) is a perfectly good decision for the reasons given therein by the Lord Chief Justice, and that the combined effect of the Housing of the Working Classes Act, 1890, and the Housing, Town Planning, &c., Acts of 1909 and 1919 is that the right of the owner under s. 15, sub-s. 6, of the Act of 1909 to appeal to the Minister of Health against a notice served upon him by a local authority still survives. [His Lordship read the section.] The section however does not go on to provide that if the owner does appeal to the Minister the decision of the Minister shall be final, neither does it provide that if the owner does not appeal to the Minister he shall be precluded from contesting his liability for the expenses incurred by the local authority in doing the work before the Court of summary jurisdiction. It is said that that part of the section is pro tanto repealed. I do not think so. It is for the Court to give a reasonable construction to the words of the statute as they stand. I think the magistrate was right in holding that s. 28 of the Act of 1919 imposed upon him the obligation of deciding the fact whether the notice served upon the owner specified a reasonable time within which he was required to do the work. The magistrate found that the notice did not specify a reasonable

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time within which the owner was required to execute the work. Therefore when the local authority entered upon the owner's premises and did the work they had no authority to do so under the statute and cannot therefore recover the expenses incurred by them in doing the work, as they were not expenses incurred under the section.

BRANSON J. I agree. As I was a party to the decision in *Ryall* v. *Cubitt Heath* (1) I think it is not necessary for me to state over again my reasons for the judgment which I gave in that case. It is suggested in the present case that the judgment in that case would have been different if it had been brought to the notice of the Court that there was an appeal to the Local Government Board open to the owner. It is true that that point was not taken, but it is clear from my judgment in that case that I came to the conclusion that s. 28 of the Act of 1919 laid down certain conditions which had to be fulfilled before the expense of doing the work could be recovered by the local authority before a Court of summary jurisdiction and that the Court was bound to be satisfied that those conditions had been fulfilled. The argument of Mr. Harney in the present case is based upon the decision in *Rex* v. *Minister of Health* (2) that an appeal lies to the Minister of Health from the notice of the local authority requiring an owner to do certain work. But it seems to me that unless the language of s. 15, sub-s. 6, of the Act of 1909 giving that right of appeal expressly provides that the decision of the Minister shall be final and conclusive, or that if no appeal is brought the question as to the reasonableness of the notice shall not be raised subsequently, it leaves in full force the right of the owner to challenge the fulfilment of the conditions required by s. 28 of the Act of 1919, when the local authority seek to recover the expenses of doing the work before a Court of summary jurisdiction. In my opinion the two cases of *Ryall* v. *Cubitt Heath* (1) and *Rex* v. *Minister of Health* (2) are not inconsistent and can stand together. It may be convenient that there should be a right of appeal to the

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Minister of Health against the notice served upon the owner by the local authority so that the owner can stop the proceedings in limine, but he is not compelled to adopt that course. That right however is quite consistent with the right which I think s. 28 of the Act of 1919 gives to the owner to raise before the Court of summary jurisdiction the point that the notice did not specify a reasonable time within which the work was required to be done. In s. 28 there is a proviso to sub-s. 1 in which an appeal is given to the Minister. If the Legislature intended to make the decision of the Minister final that might have been expressed in the proviso by saying that any difference between the owner and the local authority should be decided by the Minister and that his decision should be final and conclusive. It would be very curious if it had been intended by the Legislature to make the decision of the Minister of Health final that they should not have made the right of appeal applicable to the whole of s. 28, but should have confined it to the proviso to sub-s. 1 of s. 28. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *F. Ryall.*

Solicitor for respondent: *J. Albert Davis.*

R. F. S.

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May 9.

INLAND REVENUE COMMISSIONERS *v.* BURRELL.

Revenue—Income Tax—Super Tax—Assessment—Shareholder in Company—Winding Up—Distribution of undivided Profits—"Income"—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 66, *sub-s.* 1.

On the winding up of a limited company the undivided profits of past years and of the year in which the winding up occurred were distributed among the shareholders, of whom the respondent was one:—

Held, that super tax was not payable on the undivided profits as income, because in the winding up they had ceased to be profits and were assets only.

Dictum of Scrutton L.J. in *Inland Revenue Commissioners* v. *Blott* [1920] 2 K. B. 657, 675 followed.

CASE stated by the Commissioners for the Special Purposes of the Income Tax.

At a meeting of the Commissioners on July 26, 1920, the respondent, William Burrell, appealed against additional assessments to super tax in the sums of 7681*l.*, 113,684*l.* and 401*l.* for the years ending April 5, 1917, 1918, and 1919, made under the Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), and subsequent enactments. The assessments were made in respect of part of the sums distributed on liquidation by twenty-three steamship companies, and received by the respondent as a shareholder therein. The firm of Burrell & Son, in which the respondent was a partner, held shares, but not a controlling interest, in the above twenty-three companies, each company having been formed for the purpose of owning one ship. Each of these companies had gone into liquidation in conformity with its articles of association, which provided that it should do so when the ship it owned was either sold or lost. After all liabilities had been discharged the assets of each company, including the profits earned from the commencement of the company's year in which it was wound up to the date of its cessation of business, and also undistributed profits of past years that had been accumulated and invested and held as reserve funds, were distributed among the shareholders. Between 1915 and 1916 most of these companies had returned to their shareholders

in reduction of paid-up capital out of accumulated profits sums aggregating 337,012*l.*, showing in their balance sheets by transfer from profit and loss account to special reserve account special reserves equivalent to the amount of capital returned. The unpaid capital was increased by a similar amount. The above returned capital was never recalled to any extent. As a result of the above distribution each shareholder, including the respondent, received in the liquidation a certain fraction of the profits of the year in which the business ceased, but which the company had not resolved to divide, and of the above accumulated profits.

It was contended for the appellants that the undistributed profits retained their character of profits on the liquidation of each company unless validly capitalised before the liquidation, and that so much of the amount distributed as represented undistributed profits was income for super tax purposes. For the respondent it was contended that no part of such distributed profits should be looked upon as income but as assets only, and that the dictum of Scrutton L.J. in *Inland Revenue Commissioners* v. *Blott* (1), though admittedly obiter, governed this case.

The Commissioners held that they ought to follow the above dictum and discharged the assessments.

Reginald Hills (*Sir Douglas Hogg A.-G.* with him) for the appellants. The respondent is liable to be assessed to super tax on these sums, which are "income" within the meaning of s. 66, sub-s. 1, of the Finance (1909–10) Act, 1910, which created super tax. The undistributed profits of these companies did not cease to be profits merely because they were paid in a liquidation. The Commissioners followed Scrutton L.J. in *Inland Revenue Commissioners* v. *Blott* (1), where he said "A company is liquidated during the year of assessment, and the liquidator returns to the shareholders . . . . (3.) the reserve fund of undivided profits in the company, (4.) the undivided profits of the last year of assessment. Heads (3.) and (4.) will have paid income tax through the assessment

(1) [1920] 2 K. B. 657, 675. Affirmed in H. L. [1921] 2 A. C. 171.

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of the company; but it appears to me that none of the heads will be returnable to super tax as assessment; they are not income from property, but the property itself in course of division." It is admitted that that entirely covers this case, but it was only a dictum, and it is contended that it is wrong. In that case the only question argued was whether the shareholder had received any payment by way of income, and Rowlatt J. in the Court below (1) held that as the company had never parted with any money he had not. But in the present case the company did part with the money and paid it to the respondent.

The fruit of an apple tree, when gathered, may be treated as dividend; the respondent contends that if the tree is cut down and the fruit is then gathered it is no longer dividend. This cannot be.

[*Bouch* v. *Sproule* (2); *In re Bridgewater Navigation Co.* (3); *In re Spanish Prospecting Co.* (4); *In re Thomas* (5); and *Pool* v. *Guardian Investment Trust Co.* (6) were also referred to.]

Latter K.C. (*Sir John Simon K.C.* with him) for the respondent. The respondent is not liable to super tax on these sums, which are not "income" within the meaning of the Act of 1910, and the case is entirely covered by the dictum of Scrutton L.J. in *Inland Revenue Commissioners* v. *Blott* (7), which states the law correctly. In a liquidation nobody receives any income; there is simply a dividing up of the whole concern and everything is capital: see per Lord Macnaghten in *Birch* v. *Cropper*. (8) There is no source of income, because the whole business is wound up. The cases cited on behalf of the appellants are explained by a consideration of *In re Crichton's Oil Co.* (9) If a farmer has sheep the lambs born are the income; but if he closes down, sheep and lambs are sold and treated as capital. A dividend is an annual payment, but there is no annuality in a liquidation.

(1) [1920] 1 K. B. 114.
(2) (1887) 12 App. Cas. 385.
(3) [1891] 2 Ch. 317.
(4) [1911] 1 Ch. 92.
(5) [1916] 2 Ch. 331, 340.
(6) [1922] 1 K. B. 347.
(7) [1920] 2 K. B. 657, 675.
(8) (1889) 14 App. Cas. 525, 546.
(9) [1902] 2 Ch. 86.

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[*In re Armitage* (1) was also referred to.]

Hills in reply. These profits were never capitalised by the company, and accordingly belong to the shareholders according to their rights in profits as distinguished from their rights in capital: see Buckley on Companies, 9th ed., pp. 394, 661.

ROWLATT J. In this case there were a number of single ship companies, and it was provided in the articles of association of each that if the ship it owned was lost or sold the company should be wound up. These companies made large profits, which were not divided among the shareholders but carried forward. In the winding up of each company everything of course, including these profits, was divided up, and the question is whether super tax can be charged in the hands of shareholders upon so much as represents these undivided profits. That is not the only point, because it appears that before the winding up capital had been returned to the shareholders under the provisions of s. 40 of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), giving power to return accumulated profits in reduction of paid-up share capital. Shareholders receive back the capital on the terms that they give it back if called upon to do so, and the contention is that on the winding up that capital has been recalled and consequently an equivalent amount of undivided profits has been liberated, so that the whole of the profits fall into the same category. A question which is closely akin to the present one—namely, that of the position of bonus shares—has been before the Courts in the case of *Inland Revenue Commissioners* v. *Blott* (2), and two views were entertained. First, that the shareholder, the recipient of the bonus shares, did not receive them as profits, and that, consequently, super tax could not attach, and, secondly, that the company had power to capitalise its profits, and that it had done so by issuing these shares. But in the present case neither point arises in the same way. There is no doubt that the respondent received the money, and there is no

(1) [1893] 3 Ch. 337.
(2) [1920] 2 K. B. 657. Affirmed [1921] 2 A. C. 171.

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Rowlatt J.

doubt also that it never was capitalised by the company, but was simply lying in its coffers until the liquidation supervened. The point made by Mr. Hills for the Crown is extremely simple. He says: "There is the money, which is profits. It has been lying there all the time and has never ceased to be profits, and now that it has found its way into the hands of the respondent why should it not be subject to super tax?" The answer to the Crown is that the matter cannot be regarded independently of company law. The money was in the hands of the company as profits, but then the company was wound up, and from that moment there was neither capital nor profits but only assets, which have to be divided. I have been referred on this point to a dictum of Scrutton L.J. in *Inland Revenue Commissioners* v. *Blott*, where he said (1): "A company is liquidated during the year of assessment, and the liquidator returns to the shareholders, (1.) their original capital, (2.) accretions to capital due to increase in value of the assets of the company, (3.) the reserve fund of undivided profits in the company, (4.) the undivided profits of the last year of assessment. Heads (3.) and (4.) will have paid income tax through the assessment of the company; but it appears to me that none of the heads will be returnable to super tax as assessment; they are not income from property, but the property itself in course of division." I think that dictum is right and that this money is assets, and not profits, and consequently not "income" within s. 66, sub-s. 1, of the Finance (1909–10) Act, 1910, which imposes super tax. The appeal, therefore, will be dismissed.

Appeal dismissed.

Solicitor for appellants: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Murray, Hutchins & Co.*

(1) [1920] 2 K. B. 657, 675.

W. L. L. B.

[IN THE COURT OF APPEAL.]

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SWINBURNE *v.* ANDREWS.

Landlord and Tenant—Agricultural Holding—Compensation for Disturbance—Tenancy of different Portions of Holding commencing at different Dates—Time for giving Notice of Intention to claim—"Termination of tenancy"—Agriculture Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 76), *s.* 10, *sub-s.* 7 (*b*); *Agricultural Holdings Act*, 1908 (8 *Edw.* 7, *c.* 28), *s.* 48.

Sect. 10 of the Agriculture Act, 1920, which deals with compensation of a tenant for disturbance, provides by sub-s. 7 that such compensation shall not be payable (*b*) "unless the tenant has, not less than one month before the termination of the tenancy, given notice in writing to the landlord of his intention to make a claim for compensation under this section."

By s. 48 of the Agricultural Holdings Act, 1908, with which the Act of 1920 is to be construed as one, "Determination of tenancy" means "the cesser of a contract of tenancy by reason of effluxion of time, or from any other cause."

A landlord let a farm upon a yearly tenancy in accordance with the custom of the country upon the terms that the tenant should enter into occupation of the main portion of the land upon April 6, and of the farmhouse, farm buildings, and the remainder of the land upon May 13, and that "on the termination of the tenancy" he should give up possession of the respective portions of the farm on the corresponding dates, the whole farm being let at one entire rent:—

Held, that as both portions of the farm were held under one contract of tenancy the "termination of the tenancy" for the purposes of s. 10, sub-s. 7, of the Act of 1920 did not take place until May 13, when the contract of tenancy ceased, notwithstanding that the main portion was to be surrendered at the earlier date.

By s. 18, sub-s. 2, of the Agriculture Act, 1920, a claim by a tenant for compensation for the matters therein mentioned "shall cease to be enforceable after the expiration of two months from the termination of the tenancy" unless particulars thereof have been given to the landlord before the expiration of that period: "Provided that, where a tenant lawfully remains in occupation of part of a holding after the termination of the tenancy, particulars of a claim relating to that part of the holding may be given within two months from the termination of the occupation."

Semble per Bankes L.J. that the proviso applies only to a case in which, after the cesser of the tenancy agreement, the landlord has by a new agreement allowed the tenant to remain in occupation of a part of the holding, and not to one in which by the terms of the original tenancy agreement the tenant was entitled to remain in occupation of a part of the holding after he has given up possession of the remainder.

APPEAL from the county court of West Hartlepool on a case stated by an arbitrator under the Agricultural Holdings Act.

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By an agreement of tenancy made June 5, 1905, the landlord let a farm in the county of Durham to Miles Swinburne at the yearly rent of 140*l.* "for the term of one year (that is to say the land from April 6, 1905, excepting fields Nos. 74, 77, and 87, which together with the two dwelling houses yard gardens outbuildings and appurtenances the tenant takes from May 13, 1905) and so on from year to year."

By clause 16 of the agreement: "The foldyard manure produced during the last year of the tenancy from crops grown on the farm during that year . . . . shall belong to the tenant and shall be taken at a valuation by the landlord or the incoming tenant."

By clause 17: "The whole of the straw produced on the farm during the last year of the tenancy shall be converted into manure on the holding, and in the event of any straw not being so converted it shall be left for the following tenant without compensation."

By clause 26: "The tenant will on the termination of the tenancy deliver up to the landlord or the incoming tenant immediately after harvest possession of the tillage land that has carried a corn crop during the last year of the tenancy and is not required for the away-going crop."

By clause 28: "On the termination of the tenancy the tenant will on April 6 give up possession of the whole of the farm excepting the land required for the away-going crop the farmhouses and outbuildings with the grass fields (Nos. specified) which he retains in his possession until May 13."

On January 28, 1921, the landlord gave the tenant notice to quit "on February 2, 1922, or on or at such other day or time or days or times respectively as your tenancy shall expire next after the end of twelve calendar months from the date of the service hereof." The notice was not given for any one of the six reasons mentioned in s. 10, sub-s. 1, of the Agriculture Act, 1920.

On April 11, 1922, the tenant gave notice to the landlord of his intention to claim compensation for disturbance under that section.

It is provided by sub-s. 7 of that section that: "Compensation shall not be payable under this section . . . . (*b*) unless the tenant has not less than one month before the termination of the tenancy, given notice in writing to the landlord of his intention to make a claim for compensation under this section."

Part II. of the Act of 1920 (which includes s. 10) is to be construed as one with the Agricultural Holdings Act, 1908, by s. 48 of which "Determination of tenancy" means "the cesser of a contract of tenancy by reason of effluxion of time, or from any other cause."

The claim for compensation went to arbitration, and at the hearing it was contended on behalf of the landlord (inter alia) that the tenancy had determined on April 6 and that the tenant's notice of intention to claim compensation was consequently too late. The arbitrator referred to the county court judge the question whether the termination of the tenancy within the meaning of s. 10, sub-s. 7, of the Agriculture Act, 1920, was April 6 or May 13. The county court judge was of opinion, (1.) that having regard to the fact that one entire rent was payable in respect of both portions of the farm there was one tenancy only and not two; and (2.) that as the acreage of the land to be retained between April 6 and May 13 bore but a small proportion to that of the land to be delivered up on the earlier date, 59 acres as against 322, the tenancy must be treated as having determined on April 6, in accordance with the authorities which have established that, where different dates are fixed by agreement or custom for the delivery up of different portions of a holding held on a yearly tenancy, the notice to quit must expire on the date corresponding with the date of entry on the principal subject of the holding: *Doe* v. *Spence* (1); *Doe* v. *Watkins* (2); *Doe* v. *Hughes* (3); *Doe* v. *Howard.* (4) He was of opinion that the present case was just one of those contemplated by the proviso to s. 18, sub-s. 2, of the Act of 1920: "where a tenant lawfully remains in occupation of part of a holding after

(1) (1805) 6 East, 120.
(2) (1806) 7 East, 551.
(3) (1840) 7 M. & W. 139.
(4) (1809) 11 East, 498.

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the termination of the tenancy." (1) He accordingly held that the condition of s. 10, sub-s. 7 (*b*), had not been complied with and dismissed the tenant's claim.

The tenant appealed.

Compston K.C. and *W. Allen* for the appellant. The present case is covered by *In re Paul* (2), a case decided under the Agricultural Holdings Act, 1883, which contained the same definition of "determination of tenancy." It was there held that, where the tenant of a farm was entitled under the custom of the country to hold over a portion of the land for four months after the expiration of the notice to quit, the determination of the tenancy took place when the tenant's holding under the custom of the country ended. The county court judge thought that the tenancy determined when the occupation of the main portion of the holding ended, but having regard to the definition of "determination of tenancy" it is not now material to consider which is the principal portion and which the accessory.

Turner Samuels for the respondent. *In re Paul* (2) does not apply, for the Act of 1883 under which that case was decided did not contain a clause corresponding to s. 18, sub-s. 2, of the Act of 1920. (1) The proviso in that subsection, which was first introduced in the Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), s. 2, sub-s. 2, altered the meaning of "determination of tenancy." Although neither that Act nor s. 18 of the Act of 1920 deal with compensation for disturbance, the proviso contained in them contemplates the termination of the tenancy preceding the period during which the tenant remains in occupation of the subordinate portion of the holding. The character in which the tenant occupies that portion during the latter period is not that of tenant but of licensee. The tenancy comes to an end when the bulk of the land is surrendered. If here the tenancy enured down to May 13 a notice to quit on that date would have been good, but that could hardly be contended in view of the decisions on that point referred to by the county court judge.

(1) See Headnote. (2) (1889) 24 Q. B. D. 247.

BANKES L.J. This is an appeal from the judgment of a county court judge upon a special case which raises an important point as to the date of the termination of the tenancy of an agricultural holding for the purposes of a claim by the tenant for compensation from his landlord for disturbance. The county court judge came to the conclusion that the tenant had not given notice of his claim one month before the termination of his tenancy, as required by s. 10, sub-s. 7, of the Agriculture Act, 1920. After a full consideration I am unable to accept that view. The agreement of tenancy, though not very artistically drawn, is quite clear in its meaning to any one conversant with the custom and practice of farming. It is one of that class of agreements which are based upon the custom of the country, a custom which has come to be generally adopted because it is found to be in the interest not only of the outgoing tenant but also of the incoming tenant and the landlord. In nearly all agreements of that class you find the period of tenancy split up into three divisions; the incoming tenant going into possession immediately after harvest of the portion of the land required for the autumn cultivation, then in the early months of the year going into possession of the portion required for the spring cultivation, and not getting possession of the farmhouse and buildings until a somewhat later date, the outgoing tenant being entitled to remain in occupation of the buildings during that latter period to enable him to consume his produce and house his cattle until the weather has become sufficiently warm to allow of their being turned out. In the present agreement it seems to me perfectly plain that the parties have agreed to a tenancy which is not to terminate till May 13. It may be that it provides for the outgoing tenant giving up the bulk of the land at an earlier date, but at any rate he is entitled to continue in occupation of a substantial part of the holding, that is to say the farmhouse, the farm buildings, and certain of the fields. No doubt the land so retained by him bears but a small proportion to the total acreage of the holding, but the important point is that he keeps possession

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of the buildings. The terms of the agreement expressly state that the tenancy of those buildings together with the fields held with them shall begin and end on May 13. If we were to adopt the view of the county court judge that the tenancy determined when the occupation of the bulk of the land came to an end certain unreasonable consequences would follow. For instance in clause 16 of the agreement it is provided that the tenant shall be entitled to compensation for all foldyard manure produced during the last year of the tenancy, which is to be taken at a valuation. If the tenancy is to be treated as determined on April 6 he will get nothing for the value of the manure produced by him between that date and May 13. Then by clause 17 the whole of the straw produced on the farm during the last year of the tenancy shall be converted into manure on the holding, and in the event of any straw not being so converted it is to be left to the incoming tenant without compensation. If the tenancy comes to an end on April 6 the outgoing tenant would have to keep his cattle in the interval between that date and May 13 without straw or would have to buy straw from elsewhere, whereas if the last year of the tenancy includes that interval he would be entitled to use what straw he had left on April 6 and turn it into manure. If we turn to the interpretation clause of the Agricultural Holdings Act, 1908, s. 48, we find that the expression "Determination of tenancy" means the "cesser of a contract of tenancy by reason of the effluxion of time or for any other cause." In the present case the different portions of the holding were held under one contract of tenancy, and that contract did not cease before May 13. In those circumstances it seems to me that the tenant's notice of intention to claim compensation was given in time, and the appeal must consequently be allowed.

Reference has been made to s. 18, sub-s. 2, of the Act of 1920, which provides that "where a tenant lawfully remains in occupation of part of a holding after the termination of the tenancy" the time for giving particulars of the claim is extended, and it is said that shows that a tenancy may

determine before the tenant surrenders possession of the whole of the premises comprised in it. But in my opinion that proviso was intended to apply to a case in which after the cesser of the agreement of tenancy the tenant has been allowed by the landlord to remain on for a short time under a new agreement, not to a case where under the terms of the original agreement the tenant was entitled to remain in possession of a part of the holding after he has given up possession of the main part. I think that that proviso has no bearing on the facts of the present case.

ATKIN L.J. I agree. When one looks at the definition of "determination of tenancy" in the Act of 1908, and finds that it means "the cesser of a contract of tenancy," it is difficult to arrive at any other conclusion. Here the holding was held under a contract of tenancy, and it appears to me that there was no cesser of that contract until May 13. By the terms of that contract the farmer was to be allowed to retain the farm buildings and a portion of the land after he had given up the main portion of the farm on April 6, but if in the interval between that date and May 13 he was not to retain such possession as tenant it is hard to see in what character he was to retain it. The county court judge has referred to clause 28 of the agreement, which says that "On the termination of the tenancy the tenant will on April 6 give up possession of the whole of the farm" except the portions there specified, and he considered that as an expression of intention that the tenancy should terminate on April 6. But the same words "on the termination of the tenancy" occur in clause 26, by which "The tenant will on the termination of the tenancy deliver up . . . . immediately after harvest possession of the tillage land that has carried a corn crop during the last year of the tenancy." The harvest to which that clause applies in the present case is the harvest of 1921, which took place long before the date at which the county court judge held that the tenancy came to an end. Therefore it is clear that the words "on the termination of the tenancy" must be understood in an unusual sense. I think that they

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were loosely used to mean when the tenancy is about to come to an end by reason of effluxion of time or notice to quit. The presence of those words therefore in clause 28 does not assist the respondent's case. I think the agreement as a whole is consistent with an intention that the tenancy should not finally determine until May 13.

YOUNGER L.J. I am of the same opinion.

Appeal allowed.

Solicitors for the appellant: *Ellis & Fairbairn.*
Solicitor for the respondent: *F. Mayson, Liverpool.*

J. F. C.

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[IN THE COURT OF APPEAL.]

HARDY AND COMPANY *v.* HILLERNS AND FOWLER.

Sale of Goods—C.i.f. Contract—Goods not in Accordance with Contract—Reasonable Opportunity of Examination—Act done Inconsistent with Ownership of Seller—Right of Rejection—Sale of Goods Act, 1893 (56 & 57 *Vict.* c. 71), *ss.* 34, 35.

By s. 34 of the Sale of Goods Act, 1893: "Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract."

By s. 35: "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller. . . ."

Wheat was sold under a c.i.f. contract to be shipped from a foreign port to this country. The ship arrived and the buyers took up the shipping documents on March 20. On March 21 she commenced to discharge the wheat and the buyers took delivery. On the same day they resold and despatched to sub-purchasers a portion of the wheat so delivered to them. They subsequently discovered that it was not in accordance with the contract, and on March 23 before a reasonable time for the examination of the goods had expired they gave the sellers notice of rejection. It was contended by the buyers that before the date of the sub-sales the property in the wheat had passed to them, so that the sellers had no ownership with which the sub-sales could be inconsistent:—

Held, (1.) That, whether the true effect of a c.i.f. contract is that the

passing of the property in the goods is suspended until after the buyer has had a reasonable opportunity of examining them, or that the property passes upon the buyer taking up the shipping documents subject to its being revested in the seller in the event of the buyer rejecting the goods as not being in accordance with the contract, the transfer of the possession to the sub-purchasers was an act inconsistent with the ownership of the sellers, being either inconsistent with their ownership at the time of such transfer of possession in one view of the contract, or inconsistent with the ownership revested in them by rejection in the other.

(2.) That the provisions of s. 35 of the Sale of Goods Act are not limited by s. 34, and that the transfer of possession to the sub-purchasers put an end to the buyers' right of rejection notwithstanding that it took place before a reasonable time for examining the goods had expired.

Judgment of Greer J. [1923] 1 K. B. 658 affirmed.

APPEAL from the judgment of Greer J. on a special case stated under s. 7 of the Arbitration Act, 1889. (1)

By a contract dated March 1, 1922, made between E. Hardy & Co. (sellers) and Messrs. Hillerns & Fowler (buyers) the sellers agreed to sell to the buyers 2365 tons of Rosario and/or Santa Fé wheat shipped per steamship *Heathmore* from a port or ports in the Argentine Republic and/or Uruguay. The contract provided that the price should include freight and insurance direct or indirect to Hull, and that payment should be by cash in London in exchange for shipping documents. The ship arrived in Hull on March 18, and reported at the customs on March 20. The buyers by their London bankers took up the bills of lading in respect of the wheat on March 20. On March 21 the ship commenced to discharge the wheat, and in the course of that day discharged and delivered to the buyers 1877 qrs. On the same day, March 21, the buyers resold 200 qrs. and 100 qrs. of the wheat so delivered to them to sub-purchasers at Barnsley and Nottingham respectively. The wheat was taken to the North Eastern Railway Company's wharf and there bagged and despatched by rail. On the same day the buyers sold and forwarded 500 qrs. of the wheat to purchasers at Southwell by barge. On the same day, March 21, the buyers took samples of the wheat discharged from the steamship, when a suspicion was aroused in their minds that the wheat was not of the contract description. On March 22 the ship

(1) [1923] 1 K. B. 658.

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continued to discharge; and the buyers took further samples, when their suspicions were confirmed that the wheat was not Rosario and/or Santa Fé wheat but Entre Rios wheat, which is of an inferior quality, and on March 23 they gave the sellers notice that they rejected the whole cargo. After giving the said notice of rejection the buyers stopped all the parcels of wheat which were still in transit to the sub-purchasers, and caused them to be returned to Hull and stored there. The sellers disputed the claim of the buyers to reject, and the dispute was referred to arbitration. The arbitrators found that the wheat was not of the contract description and awarded that the sellers should take the wheat back and pay to the buyers the invoice amount which they had received together with the freight and all charges incurred. The sellers appealed to the committee of appeal. The committee found that the samples of the wheat taken by the buyers on March 21 were representative only of a small proportion of the contract quantity, and that the buyers acted reasonably in delaying a decision until further samples were obtained on the following day. They further found that the buyers acted reasonably in not giving notice of rejection before March 23, and that such notice was given with reasonable promptitude. They further awarded that if the Court should be of opinion that the buyers were not entitled to reject the wheat the sellers should pay to the buyers the sum of 543*l.* 2*s.* 10*d.*, the difference between the market value of the wheat at the date of delivery and the market value of Rosario or Santa Fé wheat at the same date. Greer J. held that the buyers by reselling a portion of the wheat and sending it to their sub-purchasers had done an act which was "inconsistent with the ownership of the sellers," and that they must therefore be deemed to have accepted it within the meaning of s. 35 of the Sale of Goods Act, 1893, and had lost their right of rejection.

The buyers appealed.

Le Quesne for the appellants. The judge was wrong in treating the case as falling within the second branch of s. 35.

This was a c.i.f. contract, and under such a contract the property passes to the buyer when the shipping documents are taken up. Here those documents were taken up on March 20, and thereupon the property in the wheat passed out of the sellers. The sale to the sub-purchasers did not take place till the following day, March 21; therefore, at the time when the act was done which was relied upon as being inconsistent with the ownership of the sellers, the sellers had no ownership that that act could be inconsistent with. If this contention is not correct a buyer can never reject after he has resold. But there are cases in the reports in which a buyer has been held entitled to reject after he has forwarded the goods to a sub-purchaser. In *Heilbutt* v. *Hickson* (1) the defendants, who were shoe manufacturers, sold to the plaintiffs a quantity of shoes intended for the use of the French army, to be delivered at a London wharf and inspected before shipment. The shoes were inspected at the wharf and passed, and forwarded to Lille, where some of the soles were cut open and found to contain fillings of paper. The defendants had agreed by letter to take back any shoes that might be rejected by the French authorities. Brett J. was of opinion that even apart from the letter the plaintiffs were entitled to reject the shoes, as there was no opportunity of an effective inspection at the wharf, and the defect was a latent one which was known to the defendants. So here the sellers must have known quite well that the wheat was not Rosario or Santa Fé wheat, and at the time it was forwarded to the sub-purchasers the buyers had not reasonable means of ascertaining that fact. In *Molling* v. *Dean* (2) a firm of colour-printers in Germany sold to the defendants in England books which they knew were going to be sent on to sub-purchasers in America. The defendants on receipt of the goods reshipped them to their American customers without inspecting them. On inspection by the sub-purchasers in America it was found that the books were not according to the contract. There was nothing to show that there was not ample opportunity of examining the goods

(1) (1872) L. R. 7 C. P. 438. (2) (1901) 18 Times L. R. 217.

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in England, and Mr. Bray as counsel for the plaintiffs took the very point relied on here that the defendants by sending the goods to America had acted in a manner inconsistent with the ownership of the plaintiffs within the meaning of s. 35. But it was nevertheless held that the defendants had not lost their right of rejection. Greer J. relied on *Perkins* v. *Bell* (1), but that case is distinguishable. There the plaintiff sold barley to be delivered at a railway station near the defendant's farm. The defendant resold to a brewer. Afterwards the plaintiff found that his servants had by mistake mixed some inferior barley with the barley sold to the defendant, and gave the defendant notice of that fact. The defendant after receipt of that notice and before the barley had left the railway station inspected it, and having so inspected it sent it on to his sub-purchaser, who rejected it. Then for the first time the defendant claimed to reject. It was held that he had lost his right of rejection. But there it was perfectly clear that by sending it forward after he had inspected it he expressed himself satisfied that it was according to the contract description and had accepted it.

Leck K.C. and *Van Breda* for the sellers were not called upon.

BANKES L.J. This case raises a question of law as to the proper construction to be placed on s. 35 of the Sale of Goods Act. Messrs. Hillerns & Fowler bought a large quantity of Rosario or Santa Fé wheat to be shipped from a port in Uruguay to Hull at a certain price including freight and insurance, payment to be by cash in London against shipping documents. The ship sailed and arrived in Hull on March 18. On March 20 the buyers' bankers in London took up the shipping documents. On the 21st the ship commenced to discharge the wheat, and on the same day the buyers sold to sub-purchasers portions of the wheat so discharged, 200 qrs. to a purchaser at Barnsley, 100 qrs. to a purchaser at Nottingham, and 500 qrs. to a purchaser at Southwell. In

(1) [1893] 1 Q. B. 193.

order to fulfil those sub-contracts they on the same day, March 21, despatched the quantities so sold by rail to Barnsley and Nottingham respectively, and to Southwell by barge. They had taken samples of wheat on the 21st, which samples had raised a suspicion that the cargo was not according to the contract description. But they allowed the discharge to continue, and on the 22nd took further samples, which satisfied them that their suspicions were well founded, and on the 23rd they gave the sellers notice that they rejected the wheat. Upon those facts the sellers contended that under the terms of s. 35 the buyers must be deemed to have accepted the goods and lost their right of rejection. The arbitration tribunal found that the wheat was not in accordance with the contract, but that owing to the difficulty of getting a fairly representative sample until a considerable portion of the cargo had been discharged it was reasonable for the buyers to delay making up their mind to reject until the 23rd.

The question now arises whether the buyers by so reselling and forwarding to the sub-purchasers portions of the wheat had lost the right to reject and were confined to their remedy in damages. The construction which Greer J. has placed upon ss. 34 and 35 of the Sale of Goods Act is one with which I entirely agree. Sect. 34 gives a buyer to whom goods have been delivered, which he has not previously examined, a reasonable opportunity of examining them before he shall be deemed to have accepted them. Then s. 35 provides as follows: [The Lord Justice read the section.] I understand that to mean that if during the currency of the reasonable time within which the examination is to be made the buyer does certain things, one of which is an "act in relation to (the goods) which is inconsistent with the ownership of the seller," he shall be deemed to have accepted them. Sect. 35 is, in my opinion, independent of s. 34, and it is quite immaterial for the purposes of that section that the reasonable time for examining the goods had not expired when the act was done. The finding therefore of the arbitration tribunal

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that in the present case that time had not expired may be disregarded.

It remains to be considered whether the act of reselling to the sub-purchasers was an act which was inconsistent with the ownership of the sellers. Mr. Le Quesne has argued that s. 35 has no application to this case, because the contract under which the wheat was sold to the buyers was a c.i.f. contract, and that upon the bank taking up the shipping documents upon March 20 the property passed to the buyers, and that consequently when they resold on the 21st there was no ownership left in the sellers with which that act of resale could be inconsistent. It seems to me that that is attempting to put a meaning on the language of the section which it cannot reasonably bear. I understand the section to refer to an act which is inconsistent with the seller being the owner at the material date; and the material date for the purposes of this case is not the date of the resale, but the date of the notice of rejection, upon receipt of which the ownership revested in the sellers. It is with that revested ownership that in my opinion the act of resale was inconsistent. And it was inconsistent with it for this reason: Where under a contract of sale goods are delivered to the buyer which are not in accordance with the contract, so that the buyer has a right to reject them, the seller upon receipt of notice of rejection is entitled to have the goods placed at his disposal so as to allow of his resuming possession forthwith, and if the buyer has done any act which prevents him from so resuming possession that act is necessarily inconsistent with his right. It is not enough that the buyer should, as in the present case, be in a position to give the seller possession at some later date, he must be able to do so at the time of the rejection. For these reasons I have come to the conclusion that the decision of Greer J. was right and that the appeal should be dismissed.

With regard to the authorities relied on by Mr. Le Quesne, the judgment of Brett J. in *Heilbutt* v. *Hickson* (1) does not seem to me to have any bearing on the point that we have

(1) L. R. 7 C. P. 438.

to decide, because in that case the material question was which was the proper place for inspection, London or Lille? In *Molling* v. *Dean* (1) it does not appear clear upon what ground the Court proceeded. It may be that that case is insufficiently reported, and that there were facts in it not stated, which would have explained the decision.

ATKIN L.J. This case raises, not I think for the first time, an important question as to the relation of s. 34, sub-s. 1, of the Sale of Goods Act to s. 35. Sect. 34 says that: "Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract." Then s. 35 says: "The buyer is deemed to have accepted the goods when . . . . the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller." A possible view of those two sections is that s. 34 limits the provisions of s. 35, and that under the latter section the buyer is not, even in the events there specified, to be deemed to have accepted the goods unless he has had reasonable time and opportunity for examining them. That seems to have been the view taken by the editors of the two last editions of Benjamin on Sale. It is there said (6th ed., p. 857) that: "Section 35 contemplates a later stage of the transaction than s. 34 (1.). Under s. 34 (1.) where the buyer has not previously examined the goods, he is *not* deemed to have accepted them until he has been able to examine them. By s. 35 it is necessary to prove some further fact in order to show that the buyer *has* accepted them." Those words "some further fact" would seem to presume that it was necessary to prove that he had a reasonable opportunity of examination as well as that he did the act mentioned in s. 35. That is no doubt a possible view, but it seems to me to be incorrect. Indeed it was not so argued by Mr. Le Quesne. And I think

(1) 18 Times L. R. 217.

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Atkin L.J.

the reason is obvious. It is that given by the learned judge. One of the acts upon the doing of which the buyer is deemed to have accepted the goods is that "he intimates to the seller that he has accepted them." I think it is plain that such an intimation may be made before he has had a reasonable opportunity of examination, and if such an intimation is made then it appears to me that without more s. 35 operates, and he is to be deemed to have accepted them. In the same way when he does an act in relation to the goods which is inconsistent with the ownership of the seller the section must be treated as coming into operation notwithstanding that the reasonable opportunity of examining them has not expired; as for instance where a man having had goods delivered to him turns them or part of them at once into his mill and uses them in the manufacture. In the present case the tribunal of appeal have found that the buyer had not had a reasonable opportunity of examination until March 23, a date which is subsequent to the act relied on by the sellers as being inconsistent with their ownership; but that finding is, in my opinion, immaterial. Therefore we have here to face the problem whether the act of the buyers in reselling and despatching the goods was inconsistent with the ownership of the sellers. If it was, they must be deemed to have accepted them. I should like to point out, in reference to that provision, that all the words of the section must have effect given to them. The words are: "When the goods have been delivered to him"—that is to the buyer—"and he does any act" of the kind specified. That means that the buyer must have got delivery before he does the act. Here the arbitrators have found the buyers did obtain delivery of 1877 qrs. on March 21, and that it was out of the wheat so delivered to them that they on the same day forwarded the various parcels to their sub-purchasers. It was however said on behalf of the buyers that before they did so the property in the cargo had already passed to them, and that therefore the sub-sales by them could not be inconsistent with the ownership of the sellers. What is the precise position with regard to the passing of the property under a c.i.f. contract

it is perhaps not necessary here to determine. My own view is that if the goods are not in accordance with the contract the property does not pass to the purchaser upon his taking up the documents if he has not had at that time an opportunity of ascertaining whether the goods are in conformity with the contract. Though it may be that the property passes subject to its being revested when the buyer exercises his right of rejection. But it does not seem to me to matter much for the purposes of this case which of those two views is correct. In either view what happened here was enough to take away the buyers' right of rejection. If the possession was transferred by the buyers to third persons in circumstances which were inconsistent either with the goods being the property of the sellers at the time of such transfer, or inconsistent with their being restored to the sellers upon the notice of rejection being given, it appears to me that the transfer was an act which was inconsistent with the ownership of the sellers; and under those circumstances I think that it is quite immaterial that the sub-purchasers may afterwards, by agreement or otherwise, have returned the goods to the buyers. Such return cannot avail to restore a right of rejection which has been lost. That being so I think that the buyers must be content with their claim in damages.

YOUNGER L.J. I agree.

Appeal dismissed.

Solicitors for the appellants: *Pritchards, for Andrew M Jackson & Co., Hull.*

Solicitors for the respondents: *Richards & Butler.*

J. F. C.

C. A.
1923
June 11.

[IN THE COURT OF APPEAL.]

ROWLAND *v.* DIVALL.

[1922. R. 2746.]

Sale of Goods—Implied Condition that Vendor has a Right to Sell—Breach of—User of Goods by Buyer—Total Failure of Consideration—Recovery Back of Price.

The plaintiff bought a motor car from the defendant and used it for several months. It then appeared that the defendant had had no title to it, and the plaintiff was compelled to surrender it to the true owner. The plaintiff sued the defendant to recover back the purchase money that he had paid, as on a total failure of consideration:—

Held, that notwithstanding that he had had the use of the car the consideration had totally failed, and he was entitled to get the purchase money back. The use of the car that he had had was no part of the consideration that he had contracted for, which was the property in and lawful possession of the car, whereas what he got was an unlawful possession which exposed him to the risk of an action at the suit of the true owner.

APPEAL from the judgment of Bray J. at the trial.

In April, 1922, the defendant, who lived at Brighton, bought an "Albert" motor car, and on May 19 he resold it to the plaintiff for 334*l*. The plaintiff, who was a motor-car dealer, drove the car from Brighton to Blandford, where he carried on business. When he got there he repainted it and exposed it for sale in his showroom. In July, 1922, he sold it to a Colonel Railsdon for 400*l*. In September, 1922, the police took possession of the car on the ground that it had been stolen from the owner by the person from whom the defendant had bought it, and the plaintiff refunded to Colonel Railsdon the 400*l*. that he had paid. Under these circumstances the plaintiff brought his action against the defendant to recover the price that he had paid to the defendant for the car, 334*l*., as money paid the consideration of which had failed. Bray J. held that as the plaintiff and his purchaser had had the use of the car from May to September there had not been a total failure of consideration, and that under those circumstances the plaintiff must be limited to his remedy in damages. He accordingly gave judgment for the defendant.

The plaintiff appealed.

Rayner Goddard K.C. and *Tucker* for the appellant. Since the passing of the Sale of Goods Act, 1893, there is in every contract of sale "an implied condition on the part of the seller that . . . . he has a right to sell the goods," and if that condition is not satisfied the buyer may if nothing more has happened recover back the price. It is only where the buyer has done something to convert the condition into a warranty that he is driven to seek his remedy in damages. But nothing was here done by the plaintiff which could have that effect. The judge below thought that the mere fact of his retaining possession of the car for a time was sufficient to change the condition into a warranty, but it is contended that that view was wrong. The plaintiff did not get what he had bargained for, which was the property in the car. No property passed to him, for his vendor had no title to convey. During the period in question the plaintiff was not in lawful possession, and was liable to the true owner. *Bray J.* relied upon the case of *Taylor* v. *Hare*. (1) There A. having obtained a patent for an invention of which he supposed himself the inventor agreed to let B. use it in consideration of an annual sum. The sum was paid for several years, when it was discovered that A. was not the inventor, as the invention was not new. B. sued to recover back the money that he had paid, and it was held that he could not recover. But the Court there were of opinion, rightly or wrongly, that B. did derive a benefit from the contract, and the judgment proceeded upon that ground.

Doughty and *R. Jennings* for the respondent. Here the buyer was not entitled to rescind the contract of sale, for there can be no rescission where a restitutio in integrum is no longer possible. And after the car had suffered the deterioration which was necessarily incidental to a four-months' user it was impossible to restore the seller to his original position. There was not a total failure of consideration here, for the temporary use of a chattel is of some value. The case is undistinguishable from *Taylor* v. *Hare* (2), for the plaintiff here derived just as much benefit from the contract as did the plaintiff in that case, who had a right to make use of the

(1) (1805) 1 B. & P. (N. R.) 260. (2) 1 B. & P. (N. R.) 260, 262.

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invention without paying anything for it. That shows that the benefit which will preclude the buyer from recovering the price need not be the precise benefit contracted for. Heath J. there said: "There never has been a case, and there never will be, in which a plaintiff, having received benefit from a thing which has afterwards been recovered from him, has been allowed to maintain an action for the consideration originally paid. . . . . It might as well be said that if a man lease land, and the lessee pay rent, and afterwards be evicted, that he shall recover back the rent, though he has taken the fruits of the land." That case was treated as well decided in *Lawes* v. *Purser* (1), where to an action by a patentee for money payable by a manufacturer who had used the patent under the plaintiff's licence a plea that the patent was void was held bad on demurrer upon the ground that the defendant, having derived benefit from the licence, could not set up the invalidity of the patent. In *Hunt* v. *Silk* (2) the defendant in consideration of 10*l.* paid by the plaintiff agreed to give the plaintiff immediate possession of a house, and to do certain repairs and execute a lease within ten days. The plaintiff paid the money and entered into possession. The defendant neglected to do the repairs or to execute the lease within the time stipulated, but the plaintiff remained in possession for some days after the ten days had expired, and then on vacating the house sought to recover back the 10*l.* It was held that he could not rescind, as the fact of his occupation of the premises under the agreement precluded him from restoring the defendant to the status quo ante.

BANKES L.J. Whatever doubt there may have been in former times as to the legal rights of a purchaser in the position of the present plaintiff was settled by the Sale of Goods Act, 1893, by s. 12 of which it was provided that: "In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is (1.) An implied condition on the part of the seller that . . . he has a right to sell

(1) (1856) 6 E. & B. 930. (2) (1804) 5 East, 449.

the goods." The facts are shortly these. The plaintiff bought a motor car at Brighton from the defendant in May, 1922. He took possession of it at once, drove it to his place of business at Blandford, where he exhibited it for sale in his shop, and ultimately sold it to a purchaser. It was not discovered that the car was a stolen car until September, when possession was taken of it by the police. The plaintiff and his purchaser between them had possession of it for about four months. The plaintiff now brings his action to recover back the price that he paid to the defendant upon the ground of total failure of consideration. As I have said, it cannot now be disputed that there was an implied condition on the part of the defendant that he had a right to sell the car, and unless something happened to change that condition into a warranty the plaintiff is entitled to rescind the contract and recover back the money. The Sale of Goods Act itself indicates in s. 53 the circumstances in which a condition may be changed into a warranty: "Where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty" the buyer is not entitled to reject the goods, but his remedy is in damages. Mr. Doughty contends that this is a case in which the buyer is compelled to treat the condition as a warranty within the meaning of that section, because, having had the use of the car for four months, he cannot put the seller in statu quo and therefore cannot now rescind, and he has referred to several authorities in support of that contention. But when those authorities are looked at I think it will be found that in all of them the buyer got some part of what he contracted for. In *Taylor* v. *Hare* (1) the question was as to the right of the plaintiff to recover back money which he had paid for the use of a patent which turned out to be void. But there the Court treated the parties, who had made a common mistake about the validity of the patent, as being in the nature of joint adventurers in the benefit of the patent; and Chambre J. expressly pointed out that "The plaintiff has had the enjoyment of what he stipulated for." The

(1) 1 B. & P. (N. R.) 260, 262.

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language there used by Heath J., though it may have been correct as applied to the facts of that case, is much too wide to be applied to such a case as the present. In *Hunt* v. *Silk* (1) Lord Ellenborough went upon the ground that the plaintiff had received part of what he bargained for. He said: "Where a contract is to be rescinded at all, it must be rescinded in toto, and the parties put in statu quo. But here was an intermediate occupation, a part execution of the agreement, which was incapable of being rescinded." And *Lawes* v. *Purser* (2) proceeded on the same ground, that the defendant had derived benefit from the execution of the contract. But in the present case it cannot possibly be said that the plaintiff received any portion of what he had agreed to buy. It is true that a motor car was delivered to him, but the person who sold it to him had no right to sell it, and therefore he did not get what he paid for—namely, a car to which he would have title; and under those circumstances the user of the car by the purchaser seems to me quite immaterial for the purpose of considering whether the condition had been converted into a warranty. In my opinion the plaintiff was entitled to recover the whole of the purchase money, and was not limited to his remedy in damages as the judge below held.

The appeal must be allowed.

SCRUTTON L.J. The discussion which this case has received in the course of the argument has made it reasonably clear to me that the learned judge below came to a wrong conclusion. The plaintiff purchased a car from the defendant for 334*l*. He drove it from Brighton, where he bought it, to the place where he had a garage, painted it and kept it there for about two months. He then sold it to a third person who had it in his possession for another two months. Then came the police, who claimed it as the stolen car for which they had been looking. It appears that it had been stolen before the defendant became possessed of it, and consequently he had no title that he could convey to the plaintiff. In these

(1) 5 East, 449, 452. (2) 6 E. & B. 930.

circumstances the plaintiff sued the defendant for the price he paid for the car as on a total failure of consideration. Now before the passing of the Sale of Goods Act there was a good deal of confusion in the authorities as to the exact nature of the vendor's contract with respect to his title to sell. It was originally said that a vendor did not warrant his title. But gradually a number of exceptions crept in, till at last the exceptions became the rule, the rule being that the vendor warranted that he had title to what he purported to sell, except in certain special cases, such as that of a sale by a sheriff, who does not so warrant. Then came the Sale of Goods Act, which re-enacted that rule, but did so with this alteration: it re-enacted it as a condition, not as a warranty. Sect. 12 says in express terms that there shall be "An implied condition on the part of the seller that . . . . he has a right to sell the goods." It being now a condition, wherever that condition is broken the contract can be rescinded, and with the rescission the buyer can demand a return of the purchase money, unless he has, with knowledge of the facts, held on to the bargain so as to waive the condition. But Mr. Doughty argues that there can never be a rescission where a restitutio in integrum is impossible, and that here the plaintiff cannot rescind because he cannot return the car. To that the buyer's answer is that the reason of his inability to return it—namely, the fact that the defendant had no title to it—is the very thing of which he is complaining, and that it does not lie in the defendant's mouth to set up as a defence to the action his own breach of the implied condition that he had a right to sell. In my opinion that answer is well founded, and it would, I think, be absurd to apply the rule as to restitutio in integrum to such a state of facts. No doubt the general rule is that a buyer cannot rescind a contract of sale and get back the purchase money unless he can restore the subject matter. There are a large number of cases on the subject, some of which are not very easy to reconcile with others. Some of them make it highly probable that a certain degree of deterioration of the goods is not sufficient to take away the right to recover the purchase money. However

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I do not think it necessary to refer to them. It certainly seems to me that, in a case of rescission for the breach of the condition that the seller had a right to sell the goods, it cannot be that the buyer is deprived of his right to get back the purchase money because he cannot restore the goods which, from the nature of the transaction, are not the goods of the seller at all, and which the seller therefore has no right to under any circumstances. For these reasons I think that the plaintiff is entitled to recover the whole of the purchase money as for a total failure of consideration, and that the appeal must be allowed.

ATKIN L.J. I agree. It seems to me that in this case there has been a total failure of consideration, that is to say that the buyer has not got any part of that for which he paid the purchase money. He paid the money in order that he might get the property, and he has not got it. It is true that the seller delivered to him the de facto possession, but the seller had not got the right to possession and consequently could not give it to the buyer. Therefore the buyer, during the time that he had the car in his actual possession had no right to it, and was at all times liable to the true owner for its conversion. Now there is no doubt that what the buyer had a right to get was the property in the car, for the Sale of Goods Act expressly provides that in every contract of sale there is an implied condition that the seller has a right to sell; and the only difficulty that I have felt in this case arises out of the wording of s. 11, sub-s. 1 (*c*), which says that: "Where a contract of sale is not severable, and the buyer has accepted the goods . . . . the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect." It is said that this case falls within that provision, for the contract of sale was not severable and the buyer had accepted the car. But I think that the answer is that there can be no sale at all of goods which the seller has no right to sell. The whole

object of a sale is to transfer property from one person to another. And I think that in every contract of sale of goods there is an implied term to the effect that a breach of the condition that the seller has a right to sell the goods may be treated as a ground for rejecting the goods and repudiating the contract notwithstanding the acceptance, within the meaning of the concluding words of sub-s. (*c*); or in other words that the sub-section has no application to a breach of that particular condition. It seems to me that in this case there must be a right to reject, and also a right to sue for the price paid as money had and received on failure of the consideration, and further that there is no obligation on the part of the buyer to return the car, for ex hypothesi the seller had no right to receive it. Under those circumstances can it make any difference that the buyer has used the car before he found out that there was a breach of the condition? To my mind it makes no difference at all. The buyer accepted the car on the representation of the seller that he had a right to sell it, and inasmuch as the seller had no such right he is not entitled to say that the buyer has enjoyed a benefit under the contract. In fact the buyer has not received any part of that which he contracted to receive—namely, the property and right to possession—and, that being so, there has been a total failure of consideration. The plaintiff is entitled to recover the 334*l.* which he paid.

Appeal allowed.

Solicitors for the appellant: *Peacock & Goddard, for Luff, Raymond & Blanchard, Blandford.*

Solicitor for the respondent: *J. C. Buckwell, Brighton.*

J. F. C.

1923
April 24.

DAVIS *v.* MORRIS.

Midwives—Uncertified Midwife—Acting under "direction" of qualified Medical Practitioner—Actual Supervision of Medical Practitioner—Midwives Act, 1902 (2 *Edw.* 7, *c.* 17), *s.* 1, *sub-s.* 2.

A woman who had formerly been, but had ceased to be, certified under the Midwives Act, 1902, was engaged to attend at five cases of confinement, and in each case as soon as she was engaged a qualified medical practitioner was also retained. In each case the woman attended and delivered the patient. In none of the cases was the doctor present or sent for at or before the birth of the child, but in each case he paid a professional visit thereafter. In none of the cases did the doctor make any professional inquiry or give any instructions. There was no emergency, but, if there had been, there was opportunity for summoning the doctors. In the opinion of the doctors the woman was capable and trustworthy, and no instructions to her were necessary in any of the cases:—

Held, that in these cases the woman had not attended the patients "under the direction" of a qualified medical practitioner within the meaning of s. 1, sub-s. 2, of the above Act, and that she was liable to be convicted under that sub-section.

CASE stated by justices for the county of Devon.

The appellant, Herbert Amphlett Davis, of Exeter, assistant solicitor for the county of Devon, preferred against the respondent, Hettie Elizabeth Morris, of Tavistock, an information under the Midwives Act, 1902, charging that she between May 5 and July 3, 1922, at Tavistock not being a woman certified under the statute unlawfully did habitually and for gain attend women in childbirth, to wit: Elizabeth Oates, Susan Harvey, Hilda Chase, Dorothy Tancock, and Hettie Middleton, otherwise than under the direction of a qualified medical practitioner contrary to s. 1, sub-s. 2 (1), of the Act.

On the hearing of the information the following facts were

(1) The Midwives Act, 1902, provides: Sect. 1, "(2) . . . . no woman shall, habitually and for gain, attend women in childbirth otherwise than under the direction of a qualified medical practitioner, unless she be certified under this Act; any woman so acting without being certified under this Act shall be liable, on summary conviction, to a fine not exceeding ten pounds; provided this section shall not apply to legally qualified medical practitioners, or to anyone rendering assistance in a case of emergency."

proved by the prosecution: The appellant was an officer of the county of Devon, and the respondent was a woman who had previously been certified as a midwife but had ceased to be certified in December, 1920. Five expectant mothers engaged the defendant to act as midwife at their several confinements and paid her fees, and she attended and delivered the patients at dates between May 5 and July 3, 1922. No medical practitioner was present or sent for in any of the cases. There was no emergency. There was opportunity for the medical men to be summoned. In every case as soon as the respondent was engaged a qualified medical practitioner was also retained. The doctors paid professional visits to the patients subsequent to the confinements, but not before.

It was contended for the respondent that as on the facts so proved the respondent had put herself under the direction of qualified medical practitioners the case should be dismissed.

The justices ruled that it was for the respondent to prove further that she was under the direction of the said practitioners when attending at the confinements. The three medical men concerned, two of them in two cases each and one of them in one, were then examined for the defence. Each of them stated that in each case in which he was retained the respondent was acting under his direction in attending at the confinement, that in his opinion she was a capable woman and to be trusted, and that no instructions, specific or otherwise, had been given in any case or were necessary. Each of the medical men who had two cases each had known the patients before, and in two instances had seen them after being retained, but not professionally, and in the fifth case the doctor saw the woman when she came to engage him. In no case was any professional inquiry made. In straightforward cases examination was never made.

The appellant's contention was that on the construction of the sub-section "under the direction" of a qualified medical practitioner means that in every case actual instructions suitable to the case should be given by the medical man to the midwife.

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On the facts the justices were of opinion that the respondent acted " under the direction " of qualified medical practitioners in attending the five cases, inasmuch as she acted under the general direction, including implied authority to effect delivery, of qualified medical practitioners, and that special directions were not required; and they accordingly dismissed the information.

The case stated by the justices recited the information, but in doing so omitted the word " habitually," which however was contained in the information itself. The case also stated that whereas the information was dismissed by the justices on a finding of fact—namely, that the respondent acted under the direction of qualified medical practitioners, they nevertheless in view of the appellant's contention that the finding involved a point of law—namely, the construction of the statute, and with respect to previous rulings of the Court, thereby stated the case in which they proceeded to set out the facts and matters above mentioned.

Harold Murphy (*H. H. Joy* with him) for the appellant. The Midwives Act, 1902, s. 1, sub-s. 2 (1), provides that no woman shall, habitually and for gain, attend women in childbirth otherwise than under the direction of a qualified medical practitioner, unless she be " certified under the Act." In the present case, as the respondent ceased to hold a certificate under the Act in December, 1920, it is clear that when she attended the confinements in question in 1922, though she may have been a competent midwife, she was not " certified under the Act " as required by the sub-section. As the confinements in question were no less than five in number, the respondent acted " habitually " within the meaning of the sub-section. In attending these cases the respondent, therefore, committed an offence against the sub-section, unless in accordance with its further requirement she acted under the direction of a qualified medical practitioner. She did not act " under the direction " of a

(1) See note (1) ante, p. 508.

qualified medical practitioner within the meaning of the sub-section. These words do not mean that the woman is to act under the mere nominal direction, but under the real and effective direction of a qualified medical man. They do not imply that it is enough that she acts in a case to the knowledge of a medical man and that he incurs responsibility; but that she is to act under the supervision of a medical man who has personally acquainted himself with the particular case and given actual directions suitable to it. To adopt the language of Lord Coleridge C.J. in *Howarth* v. *Brearley* (1) the meaning of the provision in question is that the uncertified midwife shall be merely the ministering hand under the directing brain of the qualified medical practitioner. Under the Midwives Act, 1918 (8 & 9 Geo. 5, c. 43), s. 14, sub-s. 1, in case of any emergency as defined in the rules framed under s. 3, I (*e*), of the principal Act, even a certified midwife is bound to call in to her assistance a qualified medical practitioner, and by r. 21 of these rules several cases of emergency are indicated. In these cases of emergency a certified midwife is therefore bound by the Act to call in a doctor, but according to the decision of the justices in the present case an uncertified midwife would be entitled to act without calling in a doctor and would therefore be in a position of greater freedom.

No counsel appeared for the respondent.

LORD HEWART C.J. This is a case stated by justices for the county of Devon. The case states that the appellant preferred an information under the Midwives Act, 1902, s. 1, sub-s. 2 (2), against the respondent charging that she not being a woman certified under the statute did unlawfully and for gain attend women in childbirth otherwise than under the direction of a qualified medical practitioner. The appellant's contention was that on the facts proved the respondent had not acted "under the direction" of a qualified medical practitioner within the meaning of the sub-section. On October 25, 1922, the justices dismissed the

(1) (1887) 19 Q. B. D. 303. (2) See note (1) ante, p. 508.

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Lord Hewart C.J.

information, and the question for the Court is whether or not their decision was right.

The case states these facts: [His Lordship reviewed the facts stated in the case to have been proved by the prosecution, observing that the fact that the respondent had attended at five confinements was important in view of the requirement of the sub-section that that which was complained of should be done habitually, and that the word "habitually," though omitted from the information as recited in the special case, was included in the information itself, and he then continued as follows:] To put all these facts together they come to this, that in each of the cases attended by the respondent, as soon as the respondent herself was engaged, a qualified medical practitioner was also retained, but that in no case did the doctor pay a professional visit to the patient before the confinement, in no case did he make any professional inquiry, and in no case did he give any professional instructions specific or otherwise. The Court has to consider whether on the proof of these facts there was any evidence upon which the justices could properly come to the conclusion that in these cases the respondent was acting "under the direction" of a qualified medical practitioner within the meaning of the sub-section.

The Act no doubt abstains from defining the term "direction." In my view, however, the term at any rate involves this, that before a person in the position of the respondent can with success put forward the defence that she acted under the direction of a medical man, there must be materials from which the Court can properly draw the inference that the direction was a real and not a mere nominal direction. Whatever particular ingredients the exercise of direction may involve in a given case—and undoubtedly these may vary much in different cases—it seems at least to involve this fundamental requirement, that the medical practitioner shall not only know of the case and undertake a formal liability for it, but that he shall be acquainted with the actual features of the case. The object of the Act is not merely to insure that a medical practitioner shall make

himself responsible for the case so that in the event of mischief occurring in respect of the health of the patient or otherwise he may be called to account, but to prevent mischief of that sort from occurring at all or at least in circumstances in which it cannot be satisfactorily dealt with. It is not enough therefore that there should be a qualified medical figurehead in the background who has undertaken some nominal and contingent responsibility in respect of the case. The uncertified person—and in the present case the fact that the respondent had been previously certified is immaterial—must be acting under the real direction in the particular case of a qualified medical practitioner.

There was a moment in the course of the argument when I entertained some doubt, not, indeed, regarding the construction of the sub-section, but as to whether there was not evidence before the justices upon which they could properly find as a fact that the respondent acted under the real direction of a medical man, but the argument on behalf of the appellant has entirely dispelled my doubt. I have come to the clear view that there was no evidence upon which the justices could find that the respondent acted under a real direction of that kind.

I think therefore that this appeal should succeed and that the case should be remitted to the justices with a direction to convict the respondent.

SHEARMAN J. I am of the same opinion, and I desire to add only a few words.

As to the construction of s. 1, sub-s. 2, of the Act of 1902, I think that the contention which was put forward before the justices on behalf of the county authority was most proper. In my judgment the requirement that the uncertified person should act "under the authority" of a qualified medical practitioner, means that in every case actual instructions suitable to the case should be given to that person.

As to whether there was or was not evidence in the cases in question that the respondent acted under the direction

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of a medical man within the meaning of the sub-section, I agree that there was no such evidence. It seems to me that as soon as the justices found it proved that—these are the words of the special case—"in no case was any professional inquiry made," it became their duty to convict the respondent. The facts come to this, that in each of these cases the child was delivered without the medical man having made any inquiry as to the nature of the particular case, or having given any instruction as to how the case should be dealt with.

BRANSON J. I agree.

Appeal allowed. Case remitted.

Solicitors for appellant: *Ford, Lloyd & Co., for Brian S. Miller, Exeter.*

J. R.

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May 2, 3.

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SAME *v.* SOUTH BEHAR RAILWAY COMPANY, LIMITED.

SAME *v.* ECCENTRIC CLUB, LIMITED.

Revenue—Corporation Profits Tax—"British company carrying on any trade or business, or any undertaking of a similar character"—Company performing Functions of Executor and Trustee—Railway Company merely in Receipt of Annual Payment—Company carrying on social Club—Finance Act, 1920 (10 & 11 *Geo.* 5, *c.* 18), *s.* 52, *sub-s.* 2 (*a*); *s.* 53, *sub-s.* 2 (*h*).

Sect. 52, sub-s. 1, of the Finance Act, 1920, imposes a duty called "corporation profits tax" on certain profits. Sub-sect. 2 of the same section provides that "the profits to which this Part of this Act applies are . . . . the following, that is to say—(*a*) the profits of a British company carrying on any trade or business, or any undertaking of a similar character, including the holding of investments. . . . ." By s. 53, sub-s. 2 (*h*), it is enacted that "profits shall include in the case of mutual trading concerns the surplus arising from transactions with members. . . . ."

A limited company was formed for the purpose of more conveniently administering an estate which had become vested in a large number of

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beneficiaries, and it duly performed this function. Its revenue was derived from leases of land and mines, and as the leases fell in the company renewed them. The company never worked the land or the mines:—

Held, that the company was not "carrying on any trade or business, or any undertaking of a similar character," and was therefore not liable to corporation profits tax.

A railway company, registered under the Companies Acts, agreed with the Secretary of State for India that he should hold and deal with the railway and that the company should receive from him a yearly sum of 30,000*l*. This arrangement was duly carried out, the company taking no part in maintaining or working the railway, and possessing no rolling stock.

Held, that the company was not "carrying on any trade or business, or any undertaking of a similar character," and was therefore not liable to corporation profits tax.

A company limited by guarantee carried on a social club in the ordinary way, the club being a members' and not a proprietary club. By the memorandum of association profits were not distributable among the members, and in the event of the winding up of the company any surplus was not distributable among them but was to be applied as the committee might determine. Payments were made by members for services they received at the club premises, such as the provision of meals, etc. For the year in question the company's account showed a surplus of income over expenditure.

Held, that the company was carrying on an "undertaking of a similar character" to that of a trade or business, and was therefore liable to corporation profits tax.

CASES stated by Special Commissioners of Income Tax.

INLAND REVENUE COMMISSIONERS *v.* WESTLEIGH ESTATES COMPANY, LIMITED.

The respondent company (which it was admitted was a British company within s. 52 of the Finance Act, 1920) appealed against an assessment to corporation profits tax in the sum of 190*l*. for the accounting period ending June 30, 1920.

The company was formed in August, 1900, to acquire the interests of the persons hereinafter mentioned in certain freehold estates (hereinafter referred to as the property). The company's nominal capital consisted of 96,000*l*. ordinary stock. Its objects, as set out in the memorandum of association, were (inter alia) to acquire and take over certain real estate and rents charge, subject to the leases and agreements for tenancies already granted, to grant leases of all or any

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part of the company's property with or without the concurrence of the owners of any undivided shares, in consideration of such royalties, rents, and reservations as it might think fit; to purchase, take on lease or in exchange any real and personal property and any rights and privileges which the company might think necessary or convenient for the purposes of its property or business and in particular any land, buildings, easements, machinery, plant, stock in trade; to sell, improve, repair, manage, develop, exchange, lease, mortgage, farm or work as market gardens, dispose of, turn to account or otherwise deal with all or any part of the company's property and rights; and to invest and deal with the company's monies not immediately required upon such securities and in such way as might from time to time be determined.

The property was formerly owned by two brothers, J. Hall and W. Hall, who both died many years ago. At the date of the incorporation of the company about twenty-four persons were beneficiaries under the will of J. Hall and became entitled to his share of the property. Mrs. Bubb, the daughter of W. Hall, became entitled to the whole of the latter's share of the property under his will.

In view of the great number of beneficiaries entitled under the wills and the diversity of their interests it was considered desirable that Mrs. Bubb and the beneficiaries under J. Hall's will should agree to pool their interests and to place the control of the property in the hands of a limited company; and accordingly the property was conveyed by the beneficiaries to the company. The agreement was dated August 20, 1900, the consideration for the conveyance being the issue to the beneficiaries of stock in the company. Mrs. Bubb and the beneficiaries under J. Hall's will received fully paid shares in proportion to their respective interests.

At the hearing before the Special Commissioners the following facts were proved or admitted:—

(*a*) The company took over the property exactly as it stood under the wills of J. and W. Hall. When so taken over the greater part of the property (which is coal-bearing land) was in lease to colliery owners, so that the company acquired

the reversions, while as to the unlet remainder the company acquired the freehold in possession.

(*b*) No land was ever purchased by the company other than that obtained under the agreement of August 20, 1900.

(*c*) No land was sold by the company except (1.) an inn sold in 1910 for 1050*l.* owing to a difficulty with regard to licensing and (2.) a small piece of land sold for 310*l.* in 1905 to the Leigh Corporation for public purposes.

(*d*) The company's revenue was derived from rents from surface and mining leases.

(*e*) The minerals had been worked by various lessees under leases several of which had still many years to run. On their expiration leases had been renewed or fresh leases granted to the same lessees. The company never itself worked any of the mines.

(*f*) Mrs. Bubb held half the shares in, and her husband was a permanent director of, the company. Shares could only be transferred among the existing shareholders and their families.

The Special Commissioners held as a fact that the company was not carrying on any trade or business or any undertaking of a similar character, and although they considered that the company held investments they were of opinion that the words in the statute did not operate to tax profits derived from investments held by a company which did not in some way trade or carry on business, whether in connection with the holding of investments or otherwise. Accordingly they discharged the assessment but stated this case for the opinion of the Court.

R. P. Hills (*Sir Thomas Inskip S.-G.* with him) for the Inland Revenue Commissioners. The respondent company by doing that which it was formed to do—namely, manage an estate, carries on a trade or business or an undertaking of a similar character within s. 52, sub-s. 2 (*a*), of the Finance Act, 1920, and is therefore liable to corporation profits tax. No great amount of activity is required on the part of a company to make it carry on a business : see per Atkin L.J.

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in *Inland Revenue Commissioners* v. *Korean Syndicate* (1), who also pointed out that a holding company might carry on a "business." In *Sutherland* v. *Inland Revenue Commissioners* (2) it was held that the letting, although compulsorily, by its owner of a steam drifter to the Admiralty was a "trade or business" for excess profits duty purposes. There the Court of Session did not assent to the proposition that the owner was not, for the purposes of duty, engaged in the same trade or business, during, as before, the requisition of his vessel. In this case the mining property and the grant and renewal of leases required attention, and that circumstance implies an activity sufficient to bring the company within the Act.

Latter K.C. and *Cyril King* for the respondent company. To come within the provisions of the Act imposing corporation profits tax a trade or business or undertaking of a similar character must be carried on, for it is plain that every British company is not made liable to the tax. A company must be actively doing something in the nature of carrying on a trade or business. The respondents do nothing of this nature. They merely hold a family estate for convenience to avoid the necessity of requiring a large number of signatures to leases granted, and all they do is to grant or renew leases. Whether a company is carrying on a trade or business is really a question of fact for the Special Commissioners, and the only matter for the Court is whether in this case there was evidence to support their finding. It is submitted that there was abundant evidence upon which they could find as they did.

[They referred to *Rand* v. *Alberni Land Co.* (3)]

Hills replied.

INLAND REVENUE COMMISSIONERS *v.* SOUTH BEHAR RAILWAY COMPANY, LIMITED.

The respondent company appealed against an assessment to corporation profits tax in the sum of 1454*l.* 16*s.* for the accounting period ending December 31, 1920.

(1) [1921] 3 K. B. 258, 276. (2) 1918 S. C. 788.
(3) (1920) 7 Tax Cas. 629.

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The company, which was a British company within ss. 52 and 53 of the Finance Act, 1920, was incorporated in 1895, under the Companies Acts. Its objects were to purchase and acquire the "right to enter into and to make with the Secretary of State in Council of India (hereinafter called the Secretary of State) . . . . the contract which has been prepared and is expressed to be made between the Secretary of State of the one part and the company of the other part . . . . " and for other objects set out in the memorandum and articles of association.

By a deed dated August 7, 1895, made between the Secretary of State and the company it was agreed that the company should supply to the Secretary of State the funds and materials required for the construction and making fit for traffic a railway to be called the South Behar Railway; that the Secretary of State should provide free of cost to the company the land requisite for the before-mentioned purpose; that surveys, etc., should be furnished by the company to, and be subject to the approval of, the Secretary of State; that the construction of the railway would be undertaken by the Secretary of State through such agency as he should appoint, but at the entire cost and risk of the company, the funds being supplied by the company; that until the determination of the contract the Secretary of State should work and maintain the railway; that all the business connected with the management and maintenance of the railway and the conduct of the traffic, including that interchanged with the East Indian Railway, should, so far as practicable, be carried on in the same manner and subject to the same regulations and control by the Secretary of State as the like business on the East Indian Railway.

By a deed dated August 22, 1895, made between the Secretary of State and the East Indian Railway, it was agreed that the latter should construct the South Behar Railway.

By a deed dated December 11, 1906, made between the Secretary of State and the South Behar Company, supplemental to the deed of August 7, 1895, after reciting that it had been agreed that the Secretary of State might determine

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the contract contained in the principal deed as therein mentioned, and that on such termination the company was to give up to the Secretary of State the railway and its existing stores, and the Secretary of State was to pay to the company the sum therein indicated, and after reciting that it had been agreed between the parties that as from January 1, 1906, until the determination of the principal contract such fresh arrangement between the parties as thereinafter appeared should be substituted for the provisions of the principal contract relating to the working and maintenance of the railway, it was agreed that the Secretary of State should, as from January 1, 1906, until the determination of the principal contract, be entitled to hold and use and deal with the railway for his own benefit without any interference or control on the part of the company, and the company should accordingly relinquish the same and all stores to him; that the Secretary of State should be at liberty to work, maintain, and make alterations or additions to the railway as he might think fit, any such works which he might deem necessary to be executed free of cost to the company; the Secretary of State should be under no obligation to the company to keep the railway in working order or to work the same, and the company receiving from the Secretary of State the yearly payment hereinafter mentioned should keep him and the working agency indemnified against all claims by any one claiming to be interested in the railway through or under the company; that as from January 1, 1906, until the determination of the principal contract the Secretary of State should pay to the company in London the yearly sum of 30,000*l.* by half-yearly payments, the company not being entitled to any charge or lien on the railway or its earnings in respect of the said yearly sum, and during the same period the company should not be required to pay interest to the Secretary of State on its indebtedness to him for advances on capital account, nor should the company be liable to repay the amount of that indebtedness on the determination of the principal contract; that upon the determination of the principal contract by notice of purchase the sum of 684,580*l.*

should be the sum payable under the principal contract as capital expended on the undertaking with the authorization of the Secretary of State.

At the hearing before the Special Commissioners it was proved or admitted that the agreement of December 11, 1906, was still in force; that the whole work of construction and all repairs and maintenance of the South Behar Railway were effected by the East Indian Railway on behalf of the Secretary of State; that the company, since the indenture of December 11, 1906, took no part in working, inspecting or maintaining the railway, all being done by the Secretary of State and by the East Indian Railway on his behalf; the company never possessed any rolling stock in India, nor at any material time had it any agent or representative or office in India; that the company received the sum of 30,000*l.* yearly from the Secretary of State; that the shares in the company were quoted on the London Stock Exchange, there being about 200 debenture holders and about 400 shareholders in the capital stock of the company; that there were three directors of the company, the chairman receiving 200*l.* per annum and each of the other two directors receiving 150*l.* per annum; that the secretary of the company received a salary of 150*l.* per annum; and that the company had a sum of 5000*l.* invested in National War Bonds bringing in an income of 300*l.* per annum, and in addition small sums were received from transfer fees and from money placed temporarily on deposit.

The Special Commissioners held as a fact that the company was not carrying on any trade or business or any undertaking of a similar character, and they were of opinion that the mere holding, in the circumstances above stated, of investments apart from the carrying on of any trade or business or any undertaking of a similar character did not cause liability to corporation profits tax. They accordingly discharged the assessment but stated this case for the opinion of the Court.

R. P. Hills (*Sir Thomas Inskip S.-G.* with him) for the Inland Revenue Commissioners. The respondent company

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by dealing with its property in a way satisfactory to itself has not ceased to carry on business. The yearly payment received from the Secretary of State for India is a business receipt: see *Inland Revenue Commissioners* v. *Korean Syndicate.* (1) The company is therefore liable to corporation profits tax.

Hon. Sir William Finlay K.C. and *A. M. Bremner* for the respondent company. If the construction of the material sections of the Finance Act, 1920, is the same as that of the sections imposing excess profits duty in the Finance (No. 2) Act, 1915, this case comes precisely within the decision in *Inland Revenue Commissioners* v. *Marine Steam Turbine Company* (2), where it was held that a company which merely received royalties was not receiving the profits of a "trade or business." To come within s. 52, sub-s. 2 (*a*), a company must be "carrying on"—those words govern the whole clause—a "trade or business, or any undertaking of a similar character, including the holding of investments." This company does not "carry on" any trade or business, nor does it hold investments as a business. The words "including the holding of investments" bring in trust companies, Scottish mortgage companies and the like, but the mere fact that this company, like many other companies, holds investments does not bring it within the section. The company's sole right arises on the covenant by the Secretary of State for India to pay the named yearly sum which may be redeemed in a particular way; that payment is not a rent or a payment out of profits of a business.

Hills in reply. The respondents started a business and now have handed it over for an annual money payment. In those circumstances the case is not in pari materia with the *Marine Steam Turbine Case.* (2)

INLAND REVENUE COMMISSIONERS *v.* ECCENTRIC CLUB, LIMITED.

The company appealed against an assessment to corporation profits tax in the sum of 284*l.* 4*s.* for the accounting period ending December 31, 1920.

(1) [1921] 3 K. B. 258. (2) [1920] 1 K. B. 193.

The company, which was a British company within ss. 52 and 53 of the Finance Act, 1920, was incorporated under the Companies (Consolidation) Act, 1908, on December 11, 1912, its objects, as defined in its memorandum, being (inter alia) (*a*) to promote social intercourse amongst gentlemen connected with literature, art, music, the drama, the scientific and liberal professions, sport and commerce, and, with a view thereto, to establish, maintain and conduct a club of a non-political character for the accommodation of members of the club and their friends, and to provide a club house and other conveniences, and generally to afford to members and their friends all the usual privileges, advantages, convenience and accommodation of a club, and (*f*) to buy, prepare, make, supply, sell and deal in, or arrange for the supply of all kinds of provisions and refreshments required or used by the members of the club or other persons frequenting the club house.

The liability of each member of the company was limited by guarantee to an amount not exceeding 20*s*.

By clause 6 of the memorandum it was provided that the income and property of the club should be applied towards the promotion of the objects of the club, and no member was, as such, to be entitled to receive any dividend, bonus, or other profit out of the income or property; and by the articles of association it was provided that upon the winding up or dissolution of the club any surplus remaining was not to be paid to or distributed among the members but was to be given or transferred as the committee might determine.

The company's accounts for the year ending December 31, 1920, showed a surplus of income over expenditure of 5382*l*. 17*s*. 10*d*., which sum was carried to the balance sheet of the same date.

At the hearing before the Commissioners the following facts were proved or admitted: That the club was purely a members' club and not a proprietary club; that if the amount of the members' subscriptions and entrance fees received during the year ending December 31, 1920, totalling 11,442*l*. 7*s*., was eliminated, instead of there being a surplus of income over

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expenditure, there would have been a deficit, and no liability to corporation profits tax would have existed; that the company never had been assessed to income tax in respect of any profits or surplus; that there were no receipts from anything in the nature of trade from persons other than members.

It was admitted that to involve liability to corporation profits tax the company must be brought within s. 53, sub-s. 2 (*h*), of the Finance Act, 1920, as read in conjunction with s. 52, sub-s. 2, of the same Act.

The Special Commissioners differed in opinion, one thinking that the company did not come within either s. 52, sub-s. 2, or s. 53, sub-s. 2 (*h*), of the Act, and was therefore not liable to the tax, while the other thought the company was a mutual trading concern within s. 53, sub-s. 2 (*h*), and was liable at any rate on the surplus arising from the provision of meals, bedrooms, etc.; but in accordance with the practice of the Commissioners of deciding in favour of the taxpayer where the Commissioners came to opposite conclusions, the second Commissioner withdrew his opinion, and the assessment was discharged, whereupon this case was stated for the opinion of the Court, the sole question being whether the company was liable to corporation profits tax on the sum of 5684*l.* or any sum.

Sir Thomas Inskip S.-G. and *R. P. Hills* for the Inland Revenue Commissioners. The respondent company, if not carrying on a "trade" in the strict sense, certainly carries on a "business" or an "undertaking of a similar character" within s. 52, sub-s. 2 (*a*), of the Finance Act, 1920—a view which is enforced by a consideration of s. 53, sub-s. 2 (*h*), which brings in mutual trading concerns. The company buys provisions for, and sells them to, its members just as is done in the case of a proprietary club; it does something analogous to what is done in an ordinary business. In *In re Incorporated Council of Law Reporting for England and Wales* (1) it was held that the Council was established for a

(1) (1888) 22 Q. B. D. 279; 3 Tax Cas. 105.

"trade or business" within s. 11, sub-s. 5, of the Customs and Inland Revenue Act, 1885, notwithstanding that it was precluded by its memorandum of association from making a profit for its members. The fact, therefore, that in the case of this company any profits made cannot be divided among the shareholders is for this purpose immaterial; the profits go in providing increased comforts for the benefit of the members.

[They also cited *Last* v. *London Assurance Corporation* (1) and *New York Life Insurance Co.* v. *Styles.* (2)]

Konstam K.C. and *R. W. Needham* for the respondent company. The contention on behalf of the Commissioners involves the proposition that every social club is carrying on a business—a proposition which is not well founded. There is nothing commercial about it any more than there is about an Inn of Court. *In re Incorporated Council of Law Reporting for England and Wales* (3) was decided on s. 11 of the Customs and Inland Revenue Act, 1885, under which exemption from corporation duty was given to "property belonging to or constituting the capital of a body corporate or unincorporate established for any trade or business." There, as Lord Coleridge C.J. said in his judgment, the Council did all that was ordinarily done in carrying on the business of a bookseller. In that case *In re New University Club* (4) was distinguished. In the latter case it was never suggested that the club was carrying on a trade or business. In *Carlisle and Silloth Golf Club* v. *Smith* (5) a golf club was, for the purposes of income tax, held to be carrying on a concern or business only in so far as it derived fees from visitors whom by the conditions of its lease it was bound to admit. In this case the company's receipts are derived solely from the members. Sect. 53, sub-s. 2 (*h*), which is said to throw light on the construction of s. 52, sub-s. 2, is purely a computation section and does not aid the interpretation of s. 52, sub-s. 2.

(1) (1885) 10 App. Cas. 438.
(2) (1889) 14 App. Cas. 381.
(3) (1888) 22 Q. B. D. 279; 3 Tax Cas. 105.
(4) (1887) 18 Q. B. D. 720.
(5) [1912] 2 K. B. 177; [1913] 3 K. B. 75.

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[They also referred to *Religious Tract and Book Society of Scotland* v. *Forbes* (1) and *Grove* v. *Young Men's Christian Association.* (2)]

Hills replied.

ROWLATT J. The sections of the Finance Act, 1920, relating to corporation profits tax, and the sections of the Finance (No. 2) Act, 1915, relating to excess profits duty are to some extent in pari materia in that the word " business " is found in both, but as the cases with which I am now dealing are the first that have come before the Court as to the corporation profits duty it is necessary to remember that this is a new duty and that the material words dealing with it are in a different collocation from that found in the Act imposing excess profits duty. It is therefore essential to exercise caution in following what has been said as to excess profits duty in construing the Act applicable to the new tax.

The profits to which this Part of the Act of 1920 applies are " profits of a British company carrying on any trade or business, or any undertaking of a similar character, including the holding of investments." The tax is imposed on all the profits of a company, if it is a company within the section; the tax is not imposed on the profits of its carrying on the trade or business, and the words " carrying on any trade or business or any undertaking of a similar character " are only to be looked at to ascertain whether the company comes within the section or not. The trade or business or undertaking which a company carries on may result in a loss, but if the company is within the section and if it derives profits from other sources it must pay the tax on the result of its operations as a whole. Again, it is to be observed that the section does not impose the tax on the profits of every British company. There may be British companies which do not come within the section, for if it were otherwise the rest of the section would be superfluous; and for the same reason it is not the case that every British company which is

(1) (1896) 23 R. 390; 3 Tax Cas. 415.

(2) (1903) 88 L. T. 696; 4 Tax Cas. 613.

fulfilling the objects of its memorandum of association is thereby, ipso facto, brought within the taxing section. To come within the section there must be a "British company carrying on any trade or business, or any undertaking of a similar character." One gets very little help from those latter words, because when one thing is spoken of as being similar to another, one must have some guidance as to the attribute in which the similarity is to be looked for. Here no guidance is afforded as to what characteristic of a trade or business is to be found in the undertaking which is "similar." The words "any undertaking of a similar character" only add a sort of fringe to the words "trade or business" which possibly the draftsman thought might be construed strictly. The last words "including the holding of investments" are also difficult to interpret. I have now to deal with the three cases.

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In this case the family company did nothing except what would have been done by the executors and trustees of a will administering the trusts for the beneficiaries. They had to have a mining engineer. So would the beneficiaries have had to have one. They had to have a land agent and they had to renew a lease when it fell in, but nothing was being done except carrying out the directions of the will, and the company merely existed in order that there should be one entity to act on behalf of a large number of people, several of whom I am informed were so illiterate as not even to be able to sign their names, who would otherwise have had to concur in every transaction. If there had been only one proprietor of this property and he had done those acts no one would say that he carried on a trade or business; but the fact that the company was doing those acts is a circumstance to be taken into consideration, as was pointed out in the *Korean Syndicate Case.* (1) That is not so important in relation to this corporation profits tax as it was in considering

(1) [1921] 3 K. B. 258.

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the excess profits duty, because it is clear, as I have indicated, that the fact that the company is acting within its memorandum does not of itself make it carry on a business. In the *Korean Syndicate Case* (1) the Master of the Rolls said (2): "The fact that the limited company comes into existence in a different way from that in which an individual comes into existence is a matter to be considered." Applying that to this case, I may fairly consider the fact that this limited company came into existence not with any notion of trade or business, but merely as a convenient form under which the duties and powers of an executor could be exercised. I have therefore come to the conclusion that this family company does not carry on "any trade or business, or any undertaking of a similar character." The appeal will therefore be dismissed.

INLAND REVENUE COMMISSIONERS *v.* SOUTH BEHAR RAILWAY COMPANY, LIMITED.

This railway company in the course of its earlier operations was, I should say, carrying on a trade or business, or undertaking of a similar character; but at the material time it merely had the right to receive annually, under covenant, a certain yearly sum from the Secretary of State for India. I do not know whether it has a bare legal estate in anything, but it has no tangible right to any property except its books and furniture. It does nothing at present except receive its annuity, and ultimately it will receive a lump sum. In the *Korean Syndicate Case* (3) I said that the word "business" involved something active—an expression which was criticised by Atkin L.J. when the case was in the Court of Appeal (4), but when I used the word "active" I did not mean to indicate anything very feverish in the way of activity; all I meant to say was that one could describe the thing by the use of an active verb—something positive. However that may be, it seems to me that when a company is a mere annuitant, and its ordinary shareholders are subjected to paying income

(1) [1921] 3 K. B. 258.
(2) Ibid. 273.
(3) [1920] 1 K. B. 598.
(4) [1921] 3 K. B. 276.

tax on their annuity, I am not justified, on the construction of this taxing statute, in holding that the company is carrying on a trade or business. The appeal will be dismissed.

INLAND REVENUE COMMISSIONERS *v.* ECCENTRIC CLUB, LIMITED.

The Eccentric Club is the property of a company. It takes subscriptions from the members of the club, who thereby become guarantors for the company, which is a company limited by guarantee. The club also takes payments from the members for the services they receive at the club premises. On the other hand it pays the expenses of carrying on the club, and having done this there is a balance which may or may not be profits. The question is whether up to this point the company has carried on "a trade or business or undertaking of a similar character." I have already referred to the difficulty of applying these words "undertaking of a similar character." If the question of similarity depends upon the nature of a transaction by way of buying and selling, the company is carrying on a business of an exactly similar character to that of a proprietary club, but in the ultimate destination of the results of its transactions it is wholly different from a proprietary club. Is it or is it not similar under those circumstances? It is like asking if St. Paul's Cathedral is similar to York Minster or if it is similar to any other building which has a dome. In what respect do you seek the similarity? It seems to me that this company is carrying on an undertaking of a similar character to the trade or business of a company which has a proprietary club. That I think is clear. Then comes the question whether the fact that any surplus of profits does not go to the shareholders but remains with the company and benefits possibly the present members, but at any rate benefits ultimately the future members in some form, makes any difference. The difficulties in which one finds oneself in considering *Last* v. *London Assurance Corporation* (1) and *New York Life Insurance Co.* v. *Styles* (2) are very great, but in

(1) 10 App. Cas. 438. (2) 14 App. Cas. 381.

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this case I think I have sufficient guidance in s. 53, although that is a computation section, because clause (*h*) clearly shows that the profits of a mutual trading concern are to be treated as profits. I therefore do not think it possible to say that because a company is designed to conduct its business on the mutual principle, it is not a company within the Act. In this case, therefore, I think the Crown is right and the appeal will be allowed.

Konstam K.C. Does your Lordship give judgment on the point whether there is to be any differentiation as to the subscriptions ?

ROWLATT J. I do not think there is any distinction, for the simple reason that I think the company is in the position of a proprietary club.

First and second appeals dismissed.
Third appeal allowed.

Solicitor for appellants : *Solicitor of Inland Revenue.*

Solicitor for Westleigh Estates Company : *P. R. Christie, for Bullock, Worthington & Jackson, Manchester.*

Solicitors for South Behar Railway Company : *Sandersons & Orr Dignams.*

Solicitors for Eccentric Club : *J. D. Langton & Passmore.*

J. S. H.

ATTORNEY-GENERAL *v.* SMITH AND OTHERS.

1923
June 11.

Revenue—Settlement Estate Duty—Option deferring Payment of Duty till Estate fell into Possession—Effect of Abolition of Settlement Estate Duty before Estate fell into Possession—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 5, 7—*Finance Act*, 1914 (4 & 5 *Geo.* 5, *c.* 10), *s.* 14.

Sect. 14 of the Finance Act, 1914, provides (inter alia) that "settlement estate duty shall not be levied in the case of persons dying after May 11, 1914."

The trustees of the will of the tenth Earl of C., who died in 1912, elected, under s. 7, sub-s. 6, of the Finance Act, 1894, to defer payment of estate duty and settlement estate duty on certain interests in expectancy until they should fall into possession. These interests fell into possession in 1921 on the death of the widow of the ninth Earl of C. Thereupon the Crown claimed estate duty and settlement estate duty thereon. The trustees paid the estate duty, but refused to pay settlement estate duty, relying on s. 14 of the Finance Act, 1914:—

Held, that settlement estate duty was payable, inasmuch as it was being levied, not on the death of the widow of the ninth Earl in 1921, but on the death of the tenth Earl in 1912.

INFORMATION on behalf of the Crown.

The ninth Earl of Carlisle by his will dated June 18, 1891, and codicil thereto dated December 21, 1898, devised his real estates (with certain exceptions) to his wife (hereinafter called "the late Countess"), upon the trusts, that is to say, as to Naworth Castle demesne and park, Cumberland, with certain personal effects in the castle and certain estates in the same county which were to have a gross actual rental or assessment of 2000*l.* per annum, to be selected in manner thereinafter mentioned upon trust for the then Viscount Morpeth (who afterwards became, and is hereinafter called "the tenth Earl") in fee simple, and as to the residue of the said real estates, upon trust for the late Countess for her separate use during her life, and from and after her death as to further estates in Cumberland which were to have a gross actual rental or assessment of 2000*l.* per annum, to be selected in manner thereinafter mentioned, upon trust for the tenth Earl in fee simple, and as to the ultimate residue of his real estates from and after the death of the late Countess upon trust for the issue of the ninth Earl and the late Countess as the latter

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should appoint, and in default of appointment upon trust for all the children of the ninth Earl (other than the tenth Earl) in equal shares.

The ninth Earl died on April 16, 1911, without having revoked the above-mentioned testamentary dispositions.

The tenth Earl by his will dated June 28, 1911, devised unto and to the use of trustees Naworth Castle demesne and park and the other estates in Cumberland which were to have a gross actual rental or assessment of 2000*l.* per annum, and also the right of selection thereof, upon trust for the present Earl during his life, with remainder in trust for his first and other sons according to seniority in tail male with remainders over.

Upon the death of the tenth Earl, who died on January 20, 1912, without having, so far as material, revoked his will, estate duty was paid on the real and personal estate of which he was at his death seised or entitled in possession, and settlement estate duty was also paid on so much of the same real and personal estate as was settled by his will and codicil, including the Cumberland estates as by the ninth Earl's will and codicil were devised or directed to be held in trust for the tenth Earl and were to have a gross actual rental or assessment of 2000*l.* per annum.

The trustees of the will of the tenth Earl, in exercise of the option given them by s. 7, sub-s. 6, of the Finance Act, 1894, elected to defer the payment of estate duty and settlement estate duty on the further estates in Cumberland, which were by the ninth Earl's will and codicil devised or directed to be held upon trust for the tenth Earl from and after the death of the late Countess until the same should fall into possession on the death of the late Countess.

Some time after the death of the tenth Earl his trustees, in pursuance of their powers under the will, arranged with the late Countess to take lands of the gross value of 901*l.* 12*s.* 2*d.* per annum in part satisfaction of their right to select lands of the gross rental or assessment of 2000*l.* per annum, and the late Countess agreed on her death to pay to the trustees of the tenth Earl 24,459*l.* 15*s.* 10*d.* in discharge of the right to

select further lands of the gross actual rental or assessment of 1098*l.* 7*s.* 10*d.*

The late Countess died on August 12, 1921, and thereupon the tenth Earl's trustees became entitled in possession to the lands in Cumberland of the gross actual rental or assessment of 901*l.* 12*s.* 2*d.* per annum and the said sum of 24,459*l.* 15*s.* 10*d.* Thereupon, as the information alleged, estate duty and settlement estate duty became payable in respect of those lands and moneys whereof the value as at the date of the death of the late Countess was shown to be 44,424*l.* 15*s.* 10*d.* The Inland Revenue Commissioners assessed the estate duty thereon at 4442*l.* 9*s.* 7*d.*, and settlement estate duty at 799*l.* 12*s.* 11*d.* The defendants, the present trustees under the tenth Earl's will, paid the estate duty, but denied that settlement estate duty was payable, whereupon this information was filed claiming a declaration that settlement estate duty was payable.

Sir Douglas Hogg A.-G. and *Sheldon* for the Crown. Sect. 14 of the Finance Act, 1914, which provides (inter alia) that "settlement estate duty shall not be levied in the case of persons dying after May 11, 1914," does not relieve the defendants from the duty which accrued on the death of the tenth Earl in 1912.

Latter K.C. and *Dighton Pollock* for the defendants. But for the Finance Act, 1914, settlement estate duty would have been payable, but s. 14 of that statute enacts that settlement duty shall no longer be "levied in the case of persons dying after May 11, 1914." The word "levy" means "to collect or get in": see Stroud's Judicial Dictionary and Supplement, s.v. "Levy," and Sir Howard Elphinstone's article on "The Meaning of the word 'Levy' in the Finance Act, 1894," in 39 Sol. J. 482. The effect of the section, therefore, is that settlement estate duty is no longer to be collected. This view is enforced by a consideration of proviso (*b*) to s. 14 of the Act of 1914, which provides that settlement estate duty, if paid, is to be allowed against the amount of estate duty when next payable, and if it exceeds that amount the excess is to be repaid with interest from August 15, 1914.

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ROWLATT J. In my opinion the point is really determined by this, that the settlement estate duty demanded is not being levied in the case of a person dying after May 11, 1914. It is not being levied on the death of the late Countess, but is being levied on the death of the tenth Earl, because the phrase points to the person on whose death the duty became leviable. Those words struck me as being familiar, and turning back to s. 1 of the Finance Act, 1894, I find these words: "In the case of every person dying after the commencement of this Part of this Act, there shall . . . . be levied and paid, upon the principal value . . . . of all property . . . . which passes on the death of such person a duty called 'Estate duty.'" Therefore the words used are meant to describe the person on whose death the property passes which attracts the duty. The same word "levied" occurs in the Finance Act, 1914, and that indicates that in this case the relevant person is the tenth Earl and not the late Countess. The argument for the defendants revealed a curious point under s. 14 (*b*) of the Act of 1914 as to the possibility of interest having to be paid on the duty for a period of years before the duty was in fact paid, but that point, even if well founded—I do not decide whether it is so or not—does not alter the view I have expressed that the duty claimed is now payable.

Judgment for Crown.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Bircham & Co.*

J. S. H.

BENNET *v.* UNDERGROUND ELECTRIC RAILWAYS COMPANY OF LONDON, LIMITED.

1923
June 13.

Revenue—Income Tax—Relief in Respect of "Expenses of management" —Loss on Exchange on Coupons payable Abroad—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 33, *sub-s.* 1.

Sect. 33, sub-s. 1, of the Income Tax Act, 1918, provides that: "Where . . . . any company whose business consists mainly in the making of investments, and the principal part of whose income is derived therefrom, ... claims and proves to the satisfaction of the special commissioners that, for any year of assessment, it has been charged to tax by deduction or otherwise, and has not been charged in respect of its profits in accordance with the rules applicable to Case 1 of Sch. D, the company . . . . shall be entitled to repayment of so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) for that year. . . . ."

A company, within the class dealt with by the foregoing section, had, in order to carry out its objects, to raise money abroad. It accordingly issued bearer bonds, the principal and interest thereon being payable at the holder's option in London in sterling or abroad at a certain rate of exchange. In 1919 foreign holders secured an advantage by cashing their coupons abroad, and a large majority of the coupons were cashed there. In providing currency for these payments the company suffered a loss on exchange which it contended was part of its "expenses of management" in respect of which it was entitled to the appropriate repayment of income tax under the section:—

Held, that the loss on exchange was not part of the company's "expenses of management," and therefore that the company was not entitled to the repayment claimed.

CASE stated by Special Commissioners of Income Tax.

At a meeting of the Commissioners the Underground Electric Railways Co. (hereinafter called "the Company") claimed under s. 33 of the Income Tax Act, 1918, repayment of so much of the income tax paid by it for the year ending April 5, 1920, as was equal to the amount of the tax on the sums disbursed as expenses of management for that year.

During the material period the company's business was confined to the holding of shares in companies working the several underground railways of London and financial operations connected therewith; and for the purposes of the case

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it was admitted that its business consisted mainly in the making of investments, that the principal part of its income was derived therefrom, and that for the year of assessment it was charged to income tax by deduction or otherwise, and was not charged in respect of its profits in accordance with the rules applicable to Case 1 of Sch. D.

To carry out its objects the company, not being able to raise in London all the capital required, raised money by means of bonds to bearer issued in New York, Amsterdam and Frankfort, the principal and interest thereon being payable at the bearer's option in London in sterling, or in New York, Amsterdam or Frankfort at a certain rate of exchange. The bonds carried interest, some at the rate of 4½ per cent., and some at 6 per cent., and at such further rate as should be equal to the British income tax for the time being payable on the interest on such bonds.

In consequence of the state of the foreign exchanges in 1919 the holders of the bonds secured an advantage by presenting their coupons for encashment abroad rather than in London, and a large majority of the coupons were cashed in Amsterdam and New York. To provide currency to satisfy these payments the company suffered a loss on exchange of 67,932*l.*, which it said was a sum disbursed as part of its expenses of management in respect of which it was entitled to the appropriate repayment of income tax under s. 33 of the Income Tax Act, 1918.

The appellant, the Inspector of Taxes, contended that the so-called loss on exchange was merely the measure of the larger amount of interest the company had to pay under its contract, and was not an expense of management.

The Commissioners upheld the company's claim, but stated this case for the opinion of the Court.

Sir Thomas Inskip S.-G. and *R. P. Hills* for the appellant. It is a misuse of words to say that the loss on exchange is an "expense of management." The company had to pay interest abroad because it had undertaken to do so, and the cost so incurred cannot be an "expense of management" merely

because the par value of the 1*l.* has not been maintained. If the company had had to employ an extra clerk to make the necessary calculations, the cost of that clerk might well be an "expense of management," but the loss now claimed as an expense bears no analogy to such an expenditure.

Latter K.C. and *Balloch* for the company. What is an "expense of management" must depend upon the nature of the particular company making a claim. In this case the company, not being able to obtain the whole of its capital in London, had to obtain it abroad, and to manage its business properly it had to offer to pay its foreign lenders in their own country and currency. If the company had offered to pay in sterling the expense of transporting the gold would clearly have been an "expense of management"; and what was in fact done was the equivalent of transporting gold.

Sir Thomas Inskip S.-G. replied.

ROWLATT J. I am unable to agree with the view taken by the Special Commissioners. The object of s. 33 of the Income Tax Act, 1918, is to enable a holding company which, unlike a trading company, is not assessed and has no account into which its expenses of management can be brought, to obtain relief in respect of those expenses. I have therefore to consider whether the loss on exchange suffered by this company, which is a holding company, is an "expense of management" within s. 33. The reason why the company suffered the loss in question was because, in order to carry on its business, it had to provide itself with money in New York and Amsterdam, and as it did not have money lying there it had to buy it at a high rate. If the company had been able to obtain the needed currency on favourable terms, its management would not have cost less, and on the other hand if, as happened, it could only obtain the necessary money on unfavourable terms, its management cannot be said to have cost more. In either case the cost of management is the same. It is, of course, unfortunate that what it had to buy in the market cost more than had been anticipated, but

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that excess cost does not, in my opinion, constitute an expense of management. The Crown is therefore entitled to succeed.

Judgment for Crown.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for company: *Bircham & Co.*

J. S. H.

C. A.
1923
March 13, 14, 16, 27.

[IN THE COURT OF APPEAL.]

EDWARDS AND ANOTHER *v.* PORTER AND WIFE.

[1922. E. 410.]

McNEALL *v.* HAWES.

[1922. M. 478.]

Husband and Wife—Tort of Wife—Fraud—Breach of Warranty—Tort connected with Contract—Liability of Husband.

A married woman, by fraudulently misrepresenting that her husband wanted money to pay rates and do repairs to his house, induced certain persons to hand her a sum of money, which she spent for her own purposes. The husband never authorized his wife to borrow the money or make the representation on his behalf.

In an action by the lenders against the husband and wife for the fraud of the wife:—

Held, by Bankes and Scrutton L.JJ. (Younger L.J. dissenting), that the wife impliedly warranted that she had her husband's authority to borrow the money on his behalf; that her fraud was therefore connected with a contract, and that the husband was not liable.

Judgment of Bailhache J. [1923] 1 K. B. 268 affirmed.

A married woman, to enable a friend to borrow money, handed him a life insurance policy belonging to her husband and, at the request of the intending borrower, signed her husband's name to a document drawn up by the proposed lender authorizing him to hold the policy as collateral security for the borrower's promissory note. Relying on this document the lender advanced the money to the borrower, who did not repay it. These acts of the wife were done without the knowledge or authority of her husband.

In an action by the husband against the lender to recover the policy

the lender counterclaimed against the husband and wife for the fraud of the wife:—

Held, by Bankes and Scrutton L.JJ. (Younger L.J. dissenting), that the wife warranted either that the document was a genuine document or that she had her husband's authority to sign it; that her fraud was therefore connected with a contract, and that the husband was not liable.

Judgment of Lush J. [1923] 1 K. B. 273 reversed.

Collen v. *Wright* (1857) 8 E. & B. 647 and *Starkey* v. *Bank of England* [1903] A. C. 114 applied.

THESE two appeals were heard together.

EDWARDS *v.* PORTER.

Appeal from the judgment of Bailhache J. (1)

The action was brought by the two plaintiffs against the defendants Mr. Porter and his wife to recover a sum of 355*l.* as damages for the fraud of Mrs. Porter and alternatively against the male defendant alone for money lent. The learned judge entered judgment against the female defendant in respect of her separate property, presumably for money lent or money had and received. From this decision there was no appeal. With regard to the claim against both defendants for fraudulent misrepresentation by the female defendant, for which it was alleged that her husband was liable, the facts were that she represented to the plaintiffs that her husband wanted the money to enable him to pay rates and do repairs to some property which belonged to him. The plaintiffs, induced by her representation, handed her the money. The husband was not in any need of money, he never authorized his wife to make the representation or to borrow the money, and he never received any of it and knew nothing of his wife's doings. The wife having received the money spent it.

Bailhache J. held that the wife's representation amounted to a warranty that she had the husband's authority to borrow the money on his behalf; that in accordance with *Wright* v. *Leonard* (2) she could not before the Married Women's Property Act, 1882, have been sued on such a representation though

(1) [1923] 1 K. B. 268. (2) (1861) 11 C. B. (N. S.) 258.

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false and fraudulent, and that consequently her husband was not liable upon it. He therefore dismissed the action against the husband.

The plaintiffs appealed.

McNEALL *v.* HAWES.

Appeal from the judgment of Lush J. (1) on the counterclaim in the action. The action was brought to recover a policy of life insurance fraudulently abstracted from the plaintiff's possession in the following circumstances.

In October, 1921, one Harold Holmes, who was a friend of the plaintiff and his wife, was in want of money. He asked the plaintiff's wife to lend him some. She said she could not do that, but she handed him an envelope containing a security of her own and the policy in question, which belonged to her husband. She told Holmes that he might take out her security and see if he could raise money upon it. Shortly afterwards Holmes brought back the envelope to the plaintiff's wife saying that he could not raise money on her security, but that he was keeping the plaintiff's policy in the hope of raising money on it. He promised the plaintiff's wife to return it in a week or two and begged her not to tell her husband what was being done, and she agreed to say nothing.

Holmes then took the policy to the defendant, who before he was prepared to advance money on it required some assurance that the plaintiff authorized the deposit. The defendant wrote upon a piece of paper stamped with a sixpenny stamp these words: "To Mr. Frank Wallace Hawes. Please hold my policy for 200*l.* . . . . in the Prudential Assurance Co. on my life as collateral security for the promissory note 87*l.* signed by H. Holmes this day to yourself." Holmes brought this paper to the plaintiff's wife, who fraudulently and without the plaintiff's knowledge wrote his name, H. H. McNeall, across the stamp. She did this in order to benefit Holmes, expecting that he would repay the loan to the defendant in a week or two and give her back

(1) [1923] 1 K. B. 273.

the policy. Holmes took the paper back to the defendant, who believing that the owner of the policy assented to its deposit, advanced 87*l.* to Holmes. Holmes never repaid the money, and eventually disappeared.

The plaintiff when he ascertained what had been done brought this action to recover his policy. The defendant counterclaimed 87*l.* as damages against the plaintiff and his wife for the fraud of the wife.

The learned judge gave judgment for the plaintiff on the claim. There was no appeal from this judgment. He also gave judgment for the defendant against the plaintiff and his wife on the counterclaim for 87*l.*

The plaintiff appealed.

Fior for the appellants in *Edwards* v. *Porter*.

At common law a married woman was undoubtedly responsible for all torts committed by her during coverture. Her husband had to be joined as a defendant, probably because at law, before the Married Women's Property Acts, she could possess no property apart from him and so judgment against her alone would be fruitless. But with her husband she could be sued for frauds committed by her on any person as for any other personal wrongs: *Liverpool Adelphi Loan Association* v. *Fairhurst* (1); *Wright* v. *Leonard* (2); *Earle* v. *Kingscote*. (3) This liability of the husband, which is not an original but merely a derivative liability, as is shown from the fact that if the wife died before judgment the action abated and proceedings could not be initiated or continued against the husband, has been held to exist still, notwithstanding the Married Women's Property Act, 1882: *Earle* v. *Kingscote*. (3) That point is concluded in this Court, but is still open to discussion in the House of Lords.

But at common law a married woman was incapable of binding herself by a contract; it was altogether void, and no action would lie against her husband or herself for the breach of it: *Liverpool Adelphi Loan Association* v. *Fairhurst*. (1)

(1) (1854) 9 Ex. 422. (2) 11 C. B. (N. S.) 258.
(3) [1900] 2 Ch. 585.

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The line between breach of contract and tort is often difficult to draw, and sometimes impossible; for example where the same facts will support an action for fraudulent misrepresentation and for breach of warranty. A married woman could not be sued either alone or with her husband for a breach of warranty; therefore the person who suffered damage by the breach of warranty was not allowed to recoup himself by framing his action as a claim for fraudulent misrepresentation; and so the married woman was not liable to be sued even with her husband for a fraud where it "is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction": *Liverpool Adelphi Loan Association* v. *Fairhurst* (1); *Wright* v. *Leonard*, per Willes J. (2); *Earle* v. *Kingscote*. (3) On the other hand if a married woman has in substance and in truth committed a fraud she and her husband ought not to escape liability because some ingenious draftsman has succeeded in framing a count against her on a breach of warranty. In *Edwards* v. *Porter* Bailhache J. held that inasmuch as the fraudulent misrepresentation of the wife would have rendered her liable in an action for breach of warranty of authority, therefore she was not liable to be sued with her husband for the tort. That is not the test. The test question is whether the act of the married woman is in substance and in truth a warranty or a fraud. This is a question of the real intention with which the representation is made; it is not a matter of fiction and finesse. In *Edwards* v. *Porter* the wife intended to deceive; she had no intention of warranting anything. Fraud was the substance and reality of that transaction; the warranty is a mere fiction invented in order to attain to something which is called justice between the parties, but which is not justice according to law. The words of Collins L.J. in *Earle* v. *Kingscote* (4) ought to conclude this case against the husband.

Thorn Drury K.C. and *Doughty* for the respondent in *Edwards* v. *Porter*.

(1) 9 Ex. 422, 429.
(2) 11 C. B. (N. S.) 258, 267.
(3) [1900] 2 Ch. 585, 589, 594.
(4) [1900] 2 Ch. 592.

Barrington-Ward K.C. and *Merlin* for the appellant in *McNeall* v. *Hawes.*

Lush J. in *McNeall* v. *Hawes* has not given due weight to the doctrine of *Collen* v. *Wright* (1) as extended and enlarged by the House of Lords in *Starkey* v. *Bank of England* (2); the doctrine namely, that a person professing to contract as agent for another undertakes to the person entering into the contract upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist. That doctrine "extends to every transaction of business into which a third party is induced to enter by a representation that the person with whom he is doing business has the authority of some other person": per Lord Davey. (3) When Mrs. McNeall authorized Holmes to represent to possible lenders either that she had her husband's authority to sign his name to the stamped paper, or that the paper was a genuine document, she thereby agreed to indemnify Hawes or any other person who should advance money on the faith of that document. This is in its nature and essence a liability in contract: *Dickson* v. *Reuter's Telegram Co.* (4) Misrepresentations on the faith of which the plaintiff has acted, and which might have been treated by him as contracts or warranties, are not binding on the feme covert or the infant; for, if they were binding, then the protection which the law throws over married women and infants would be in a great measure withdrawn: *Wright* v. *Leonard*, per Byles J. (5)

Fior in reply in *Edwards* v. *Porter.*

Lord Erleigh for the respondent in *McNeall* v. *Hawes.* All that has been urged in favour of the appellant in *Edwards* v. *Porter* applies with greater force to the case for the respondent in *McNeall* v. *Hawes.* In the former case the wife did come into some contractual relation with the plaintiff. In the latter case the defendant (plaintiff in the

(1) 8 E. & B. 647.
(2) [1903] A. C. 114.
(3) [1903] A. C. 119.
(4) (1877) 3 C. P. D. 1.
(5) 11 C. B. (N. S.) 265.

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counterclaim) did not know of Mrs. McNeall's existence. He thought he was all through the transaction dealing with Holmes and Mr. McNeall, and never for one moment did his mind rest upon Mrs. McNeall; and yet it is said that he contracted with her. This is to strain the doctrine of *Collen* v. *Wright* (1) beyond the extent authorized by *Starkey* v. *Bank of England.* (2) The liability which that person incurs who makes a statement false to his knowledge to an intermediate person in the hope and expectation that he will communicate it to another who will act on it, is a liability in tort in an action of deceit. *Polhill* v. *Walter* (3) and *Langridge* v. *Levy* (4) are examples of this. An ingenious pleader might be able on these facts to frame a count in contract which might survive a demurrer; but that is just the sort of ingenuity which was discredited by Collins L.J. in *Earle* v. *Kingscote.* (5)

Barrington-Ward K.C. in reply. Holmes was the channel by which Mrs. McNeall's offer of indemnity was to be communicated to any person who should lend money on the faith of the document. When Hawes lent the money that offer was accepted and a contractual obligation was established. That being so, she could not be sued in tort, and her husband was not liable.

Cur. adv. vult.

March 27. The following written judgments were delivered:—

BANKES L.J. *McNeall* v. *Hawes* is an appeal from a judgment of Lush J. in an action in which it was sought to make a husband liable for a tort committed by his wife. The law in relation to the husband's liability for such a tort rests on a fiction which in spite of the passing of the Married Women's Property Act, 1882, must still be recognized by this Court. This is the result of the decision in *Earle* v. *Kingscote.* (6) The present state of the law is so accurately stated by the

(1) 8 E. & B. 647.
(2) [1903] A. C. 114.
(3) (1832) 3 B. & Ad. 114.
(4) (1837) 2 M. & W. 519.
(5) [1900] 2 Ch. 592.
(6) [1900] 2 Ch. 585.

learned judge in his reported judgment (1) that there is no need to repeat what he there says. In this and in every similar case the question of the husband's liability resolves itself into a question of what is the true inference of law to be drawn from the facts. In other words, is the fraud of the wife which is complained of one which is called in many of the reported cases a naked tort, or is it a fraud connected with the contract? If the latter, the husband is not liable. On the findings of the learned judge that the wife wrote her husband's name on the document fraudulently the material facts may be stated thus: Holmes required a loan. Hawes was prepared to lend him money provided the signature of McNeall, the husband, could be obtained to a document whereby he pledged his life policy as security for the loan. Mrs. McNeall, the wife, in order to induce Hawes to lend the money, fraudulently wrote her husband's name on the document and handed it to Holmes in order that he might take it to Hawes. The contention for the husband is that the true inference from these facts is that the law will imply a warranty on the part of the wife that she had her husband's authority to sign his name and that the document was a genuine one. Lush J. negatived this contention. The question for decision is whether his view is the correct one or not. The exact point does not appear to have been decided, nor can I find any reference to it in the reported cases. It is this: Does the doctrine of implied warranty introduced by the decision in *Collen* v. *Wright* (2) require for its application the presence of the essentials to the making of an ordinary contract, or is it implied by law apart from those essentials wherever the agent professes to have the authority which in fact he has not got? If the former, then in the present case, as the proposed lender was entirely unaware of the wife's existence, or that she had taken any part in the matter, the essentials of a contract whether express or implied as between him and her are entirely absent. I do not myself think that the doctrine of *Collen* v. *Wright* (2) depends for its application upon the existence of these essentials. This

(1) [1923] 1 K. B. 278. (2) 7 E. & B. 301; 8 Ib. 647.

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seems to follow from the decision of *Starkey* v. *Bank of England* (1), and, though attention was not expressly directed to this point, the language of Willes J. in *Collen* v. *Wright* (2), of Bramwell L.J. in *Dickson* v. *Reuter's Telegram Co.* (3), of Lindley L.J. in *Firbank's Executors* v. *Humphreys* (4), and of Lord Davey in *Starkey* v. *Bank of England* (5), appears to me to lead to the same conclusion. I will only quote from the two last mentioned cases. In dealing with the rule laid down in *Collen* v. *Wright* (6) Lord Davey says this: "As a separate and independent rule of law it is not confined to the bare case where the transaction is simply one of contract, but it extends to every transaction of business into which a third party is induced to enter by a representation that the person with whom he is doing business has the authority of some other person." In *Firbank's Executors* v. *Humphreys* (7) the facts were that in order to induce a contractor to go on with the work of constructing a railway the directors issued to the contractor debentures of the company which were invalid. In dealing with these facts Lindley L.J. says (8): "There is the representation by the directors to the contractor and consideration given by him in the shape of action by him on the faith of such representation. Nothing more is necessary to make the principle laid down in *Collen* v. *Wright* (6) applicable to the case." Applying this language to the present case I find the representation by the wife to the intending lender consisting in her writing her husband's signature and handing it to the intending borrower to be by him handed to the lender, and I find the intending lender acting on the representation. Under these circumstances I consider that the appellant has established in the present case that, to use the language of Pollock C.B. in *Liverpool Adelphi Loan Association* v. *Fairhurst* (9), the fraud complained of "is directly connected with the contract with the wife, and is the means of effecting it,

(1) [1903] A. C. 114.
(2) 8 E. & B. 647, 657.
(3) 3 C. P. D. 1, 5.
(4) (1886) 18 Q. B. D. 54, 62.
(5) [1903] A. C. 114, 118.
(6) 7 E. & B. 301; 8 Ib. 647.
(7) 18 Q. B. D. 54.
(8) 18 Q. B. D. 62.
(9) 9 Ex. 422, 429.

and parcel of the same transaction"; and as a result "the wife cannot be responsible" nor can "the husband be sued for it together with the wife." In my opinion the appeal must be allowed with costs, the judgment must be set aside and entered for the appellant with costs.

In *Edwards* v. *Porter* the appeal, like that in *McNeall* v. *Hawes*, raises the question of the husband's liability for a tort committed by the wife. In this as in that case the result must depend upon what is in law the true inference from the facts. In the present case I assume that the learned judge found that the statements by the wife were not only false but fraudulent, though this finding is not expressly mentioned in the report. From the nature of the statements it would appear that if false they must also have been fraudulent. If the view which I have expressed in the case of *McNeall* v. *Hawes* is correct, it governs the present case, as the wife must be held to have impliedly warranted that she had her husband's authority to make the statement complained of which induced the plaintiffs to part with their money to the wife. Bailhache J. seems to have felt no doubt as to the existence of the implied warranty of authority, and he says in terms that the wife would be liable if sued in an action for deceit or in an action for breach of warranty of authority. For the reasons I have given in my judgment in the case of *McNeall* v. *Hawes* I think that the learned judge drew the correct inference in law from the facts and that upon the authorities as they stand the husband cannot be held liable for the tort of the wife which is complained of. The appeal fails and must be dismissed with costs.

SCRUTTON L.J. These cases raise the difficult question of the limits of the liability of a husband for the torts of his wife.

Before the Act of 1882 neither husband nor wife could be sued alone for the wife's torts. The husband must be joined "for conformity," and judgment could be given against him, but that this liability was a very peculiar one is shown by the fact that if the wife died, or the marriage was dissolved before

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judgment was given, the husband at once ceased to be liable for torts committed by his wife during the coverture. To this rule there was an exception that, as the wife could not contract during coverture, a creditor was not allowed to get indirectly the benefit of a contract with the wife, by turning it into a tortious cause of action, for the same reason as led to the conclusion that an infant who could not contract was not liable for obtaining a contract by a fraudulent representation that he was of full age.

There would be a great deal to be said for the view that when the Act of 1882 allowed an action to be brought against the wife without joining the husband, and allowed the wife to contract, though only to the extent of her separate property, the previous rule and exception as stated above, which were based on the previous state of the law, might disappear, and a husband might now only be liable for his wife's torts if she was his agent with express or implied authority, and not when she was living apart from him or acting in defiance of his instructions. This was forcibly stated by Fletcher Moulton L.J. in *Cuenod* v. *Leslie*. (1) But as far as this Court is concerned we are bound by the decision in *Earle* v. *Kingscote* (2) to hold the contrary. In that case this Court held that the Act of 1882 had not freed the husband from his previous liability for his wife's torts, or extended the exception to his liability. The House of Lords in its judicial or legislative capacity must make the change if it is to be made.

This compels us to consider the limits of the exception to the rule. It was stated by the Court in *Liverpool Adelphi Loan Association* v. *Fairhurst* (3) in these words: "When the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible, and the husband" cannot "be sued for it together with the wife." Willes J., who was the unsuccessful counsel in that case, repeated that statement in his judgment, in which Williams J. agreed, in *Wright* v. *Leonard* (4), adding that it was the extreme length to which

(1) [1909] 1 K. B. 880, 887.
(2) [1900] 2 Ch. 585.
(3) 9 Ex. 422, 429.
(4) 11 C. B. (N. S.) 267.

the exemption had been carried and that the general rule should not be further infringed. Of the two members of the Court who took the opposite view, Byles J. would extend the exemption to all false representations which involved contracts or warranties by the wife; Erle C.J. to false representations by the wife which were in the nature of guarantees and therefore contracts by her. *Wright* v. *Leonard* (1) was decided in 1861, but four years before that, in *Collen* v. *Wright* (2), the Exchequer Chamber had solved the difficulty of the position of an agent who falsely represented he had authority from A. to make a contract, by holding that such an agent warranted and promised he had that authority and was liable for breach of warranty or contract if he had not; while in 1903 in *Starkey* v. *Bank of England* (3) *Collen* v. *Wright* (2) was approved by the House of Lords and applied to cases where no contract was made by or with an agent, but where a document was put forward to be acted upon, the implied undertaking or promise being that the document which the defendant represented to be genuine was genuine: see also *Dickson* v. *Reuter's Telegram Co.* (4), where Bramwell L.J. pointed to the contract in *Collen* v. *Wright* (2) as distinguishing the one case from the other. It would seem therefore that before 1883 an agent fraudulently representing that he had authority to make a contract, or that a document on which he invited action was genuine, might be sued either in tort in an action for deceit, or in contract on the implied warranty. This is the view taken by Sir F. Pollock (5), and in the notes to *Thompson* v. *Davenport* (6), with which I agree. It would also appear to follow that as, if the agent were a wife, she could not be sued on her contract or implied warranty: see per Brett L.J. in *Drew* v. *Nunn* (7), so neither could she be sued on her fraudulent representation, which gave rise to the alleged warranty. The cases appear consistent with this view. In *Cooper* v. *Witham* (8), where the

(1) 11 C. B. (N. S.) 258.
(2) 8 E. & B. 647.
(3) [1903] A. C. 114.
(4) 3 C. P. D. 1, 5.
(5) Pollock on Torts, 12th ed. (1923), p. 552.
(6) 2 Sm. L. C., 11th ed. (1903), p. 393; 12th ed. (1915), p. 370.
(7) (1879) 4 Q. B. D. 661, 666.
(8) (1668) 1 Lev. 247.

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wife by falsely alleging she was single had obtained a contract of marriage with the plaintiff, the Court held that as neither she nor her husband was liable on her contract, she and her husband could not indirectly be made liable by a claim in tort. In *Liverpool Adelphi Loan Association* v. *Fairhurst* (1) in 1854, the wife signed a promissory note as surety, fraudulently alleging she was single, whereby the plaintiff was induced to lend money to a third party, and it was held that as she was not liable on her promissory note, she and her husband were not liable for the fraudulent representation that induced it and was part of the transaction. In *Wright* v. *Leonard* (2) in 1861, five years after *Collen* v. *Wright* (3), the wife induced the plaintiff to discount bills for one Salt by falsely representing that the signature of her husband thereto as acceptor was genuine. Two of the judges thought there was a guarantee or warranty by the wife, and that as she was not liable on that she was not liable on the false representation. The other two thought that as the wife herself was not a party to the bills, she made no contract, and therefore was liable, as was her husband, for the deceit. There might at that time be ground for thinking that the warranty in *Collen* v. *Wright* (3) was limited to authority to make a contract, but the subsequent decision in *Starkey's Case* (4) shows that the warranty also arises when documents are put forward as genuine to be acted upon, though not for the purpose of making a contract with the person putting them forward, and would show that the wife warranted in *Wright* v. *Leonard* (2) the genuineness of the acceptance she put forward. In *Earle* v. *Kingscote* (5) the wife made a contract with the plaintiff free from fraud, and then fraudulently represented that a fact existed, the purchase of shares, which entitled the wife to payment; and the Court held that the fraud was subsequent to and independent of the contract, and therefore the husband was liable. We are bound by this, but it does not affect either of the present cases before us.

(1) 9 Ex. 422.
(2) 11 C. B. (N. S.) 258.
(3) 8 E. & B. 647.
(4) [1903] A. C. 114.
(5) [1900] 2 Ch. 585.

Of these, in *Edwards* v. *Porter* the plaintiff purported to make a contract with the husband through the wife as agent. She had in fact no authority to make it and knew it. She received the money for the husband and spent it adversely to him. She could in my view since 1882 have been sued, but so as to bind her separate property only, either for breach of warranty of authority under *Collen* v. *Wright* (1) or for money had and received in assumpsit the tort being waived. In either case she and her husband appear to have the protection of the old rule as it existed before 1882, that as she could not be sued in contract she and her husband could not be sued in tort in respect of the false representations which induced the contract. It is very unsatisfactory that, when the reason for the old rule of liability of the husband and the reason for the exception in cases of contract have both gone, the old rule should continue, but the decision of this Court in *Earle* v. *Kingscote* (2) binds us to hold that both do continue. In the case of *Edwards* v. *Porter* therefore I think Bailhache J. came to a right conclusion, and the appeal should be dismissed with costs.

In *McNeall* v. *Hawes* a wife in fact induced the plaintiff to lend money to a third party on the security of her husband's life policy by signing without authority her husband's name to an authority to hold that policy as security for a loan. The judge has found that she was guilty of fraud. The wife did not herself come into relation with the lender, but she forged her husband's signature to the authority knowing that it was to be shown to the lender that he might act on it. It was I think admitted that an action of deceit by the lender would lie against her, though at the time of acting on the forged document the lender did not know she had caused it to be put forward. It was also I think admitted that if she had signed the document " per pro " her husband, an action under *Collen* v. *Wright* (1) would have lain against her, but for the fact that she was a married woman. But it was said that no action of contract or implied warranty lay against her for simply forging the document though with the

(1) 8 E. & B. 647. (2) [1900] 2 Ch. 585.

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intention that it should be shown to the lender that he might act upon it, as the lender did not know of her existence or action. In support of this the judgment of Collins L.J. in *Earle* v. *Kingscote* (1) was relied on, protesting against an academic statement of an unreal contract when the complaint was really of tort. In that case the contract to lend money to purchase shares was made without fraud, and then the lender was induced to perform it by the fraudulent statement that the shares had been purchased, and the Court held that the fraud was subsequent to and independent of the contract, in which case the contract did not relieve the husband from liability for the independent fraud. Collins L.J. can hardly have meant that where the fraud preceded and induced a contract and itself might give rise to a liability in contract it was inoperative. In *Cooper* v. *Witham* (2) the fraud of the wife in representing she was single was more real than the contract to marry by a lady already married, but the husband and wife were held free from liability. In this case I am of opinion that if a person creates for the purpose of its being shown to and acted upon as genuine by another a false document, and the false document is so shown and acted upon, the person who acts upon it can, when he discovers the facts, sue the author of the document (1.) for a breach of warranty of genuineness under *Collen* v. *Wright* (3), as explained in *Starkey* v. *Bank of England* (4), or (2.) for deceit, in knowingly putting forward a false document with intent that it should be acted upon. If the author of the document is a married woman, she could not formerly be sued on the warranty, as stated by Brett L.J. in *Drew* v. *Nunn*. (5) If so, she cannot indirectly be made liable on the false representation; and therefore her husband cannot be made liable for her tort. In *Smout* v. *Ilbery* (6), where the agency of the wife was determined by death, the wife was held not personally liable for goods supplied after the death. This case, which was decided before *Collen* v. *Wright* (3), has however as regards

(1) [1900] 2 Ch. 592.
(2) 1 Lev. 247.
(3) 8 E. & B. 647.
(4) [1903] A. C. 114.
(5) 4 Q. B. D. 666.
(6) (1842) 10 M. & W. 1.

agents generally been overruled by this Court in *Yonge* v. *Toynbee* (1), though Vaughan Williams L.J. was inclined to think that *Smout* v. *Ilbery* (2) might be supported on the ground stated by Alderson B. at the end of his judgment, that a wife could not contract in her own name, or, one may add since *Starkey's Case* (3), as one warranting the genuineness of a document she puts forward as genuine. I think that Lush J., from whom I differ with the greatest hesitation, failed to appreciate the extent to which *Collen* v. *Wright* (4) has been carried by the decision in *Starkey's Case.* (3) He was prepared to agree with the decision of Bailhache J. in *Edwards* v. *Porter* on the ground that there was in that case a warranty like that in *Collen* v. *Wright* (4) which the plaintiff could not ignore by suing in tort. But it appears to me that in this case there was a warranty like that in *Starkey's Case* (3), a warranty of the genuineness of a document signed by the wife to be put forward and acted upon as genuine though she knew it was not genuine, and that the lender could not ignore this by suing in tort. For these reasons I think that the appeal of the husband should be allowed with costs and that the judgment of Lush J. against the plaintiff for 87*l.* on the counterclaim should be reversed and judgment entered for him on the counterclaim with costs.

Under these circumstances also the plaintiff should have the costs of the claim, though I cannot think that on the learned judge's view of the case he should have deprived the plaintiff of costs.

The plaintiff's objection to the measure of damages against him would not in any view have succeeded, as the sum the defendant lost was the sum he advanced in consequence of the warranty.

I regret that this case falls to be decided on reasons quite remote from actuality, but it is the result of the decision in *Earle* v. *Kingscote.* (5) I should prefer to have held that when the reason for the liability of the husband and for the

(1) [1910] 1 K. B. 215.
(2) (1842) 10 M. & W. 1.
(3) [1903] A. C. 114.
(4) 8 E. & B. 647.
(5) [1900] 2 Ch. 585.

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exception to that liability had ceased, the liability and exception had ceased, and the ordinary law of liability for torts committed by a third person remained.

YOUNGER L.J. In *Edwards* v. *Porter* the cardinal fact is that no loan was made by the plaintiffs to the defendant Mrs. Porter, nor was one asked for by her. The money was lent or was intended to be lent by the plaintiffs to her husband, the respondent, on his wife's false and fraudulent statement that he wanted the money to pay rates and provide for the repairs of some small property of his at Poplar. By the same fraud the wife induced the plaintiffs to hand over the money to herself, and she, when she got it, applied it all to her own purposes. The plaintiffs were cheated out of their money by the deceit of the respondent's wife. That is in truth and substance all that happened.

In these circumstances we are called upon on this appeal to inquire into the question whether the respondent, the husband, is liable for that very serious fraud of his wife. If he is so liable to the appellants it is by the survival of an old rule of law quite opposed, it may well be, to the practically unqualified proprietary rights and responsibilities of married women as these now exist; so alien indeed to these rights and responsibilities that had their introduction been other than statutory it might well have been held that their advent brought the rule itself to an end on the principle "Cessante ratione legis, cessat lex ipsa." But the relevantly effective change in the status of married women was made by statute, by the Married Women's Property Act, 1882, and it was held in this Court over twenty years ago that that statute is in its terms not operative to do away with the old rule, which accordingly, so far at least as we are concerned, still survives in all its original strength. As Cozens-Hardy M.R. said in *Cuenod* v. *Leslie* (1) we have to treat such a case as the present "in the same way as it would have been treated in the year 1880"; a statement which involves amongst other things that we must assume in the application of the

(1) [1909] 1 K. B. 880, 885.

rule that a married woman can still no more bind herself by contract than she could before that Act of 1882 : for it is upon that basis that the distinction between the wife's liability and her non-liability in these cases rests.

Now the position of a husband when he was sued jointly with his wife for her torts committed either before or during coverture is very clearly stated by Fletcher Moulton L.J. in *Cuenod* v. *Leslie* (1) : "Strictly speaking he was not liable for them in any way, but, inasmuch as during coverture the wife could not be sued without her husband, it was necessary to join him 'for conformity,' as it was termed, and if judgment was obtained while the action was in this state it was a personal judgment against both, entailing the usual consequences. But the reason of the presence of the husband in the action and the nature of his position therein were recognized and continued effective down to judgment. If the wife died before judgment the action abated. If the husband died before judgment the action continued against the wife, and whatever the nature of the tort the husband's representatives were not liable and could not be joined. The Courts acted consistently on the principle that the husband was a defendant only because he must be made so by reason of the rule of law that the wife could not be sued alone. This is laid down with the utmost clearness in a judgment of Erle C.J. in *Capel* v. *Powell* (2), and the law as there stated has so far as I know never been questioned and is in accordance with all the authorities."

This statement of the position gives prominence to the aspect of it which it is specially desirable in this case to emphasize. The husband's liability is that of his wife, not his own. He is made a defendant "for conformity." The question whether he is liable for this tort or for that tort of his wife does not depend on any consideration due to him in his character of husband ; it depends solely on the question whether his wife is herself liable for the tort. If she is, so is he. If she is not, he too is exempt from liability. The question therefore here, as in all these cases, resolves itself

(1) [1909] 1 K. B. 880, 887. (2) (1864) 17 C. B. (N. S.) 743.

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into this: Could the wife in an action properly constituted have been made liable in damages before the year 1883 for this fraud which has been proved against her? I find that it assists to state the question in this form. I find that when it is so stated the reasons for the proper dividing line between a tort for which a married woman could be made liable and one for which she could not, become more intelligible than when these reasons are adduced with reference to the liability of the husband as a separate matter.

Now it has been said that a wife was then liable only for her "naked" torts. The meaning of that expression, and the reason for her being exempt from liability for torts that could not be so described, is well set forth in the judgment of Willes J. in *Wright* v. *Leonard* (1): "As a general rule, a married woman is answerable for her wrongful acts, including frauds, and she may be sued in respect of such acts jointly with her husband, or separately if she survives him. The liability is hers, though, living with the husband (2), it must be enforced in an action against her and him, which, to charge him, must be brought to a conclusion during their joint lives. Inasmuch, however, as she is not liable upon her contracts, the common law, in order effectually to prevent her being indirectly made so liable under colour of a wrong, exempts her from liability even for fraud, where it is 'directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction.' Such was the decision of the Court of Exchequer in *Liverpool Adelphi Loan Association* v. *Fairhurst*. (3) This is the extreme length to which the exemption has been carried in any decided case; and we do not consider ourselves entitled, upon grounds of supposed policy only, to infringe further upon the general rule of law." This judgment gives the reason for excepting certain frauds from those for which a married woman must remain liable. These excepted frauds were so favoured, because if they had not been, the married woman would in the result have lost the protection which the law gave her

(1) 11 C. B. (N. S.) 258, 266. (2) Quaere "living the husband."
(3) 9 Ex. 422, 429.

against contracts made by her during coverture. But the conditions of exception were strict. The fraud to be excepted must have been as stated in the *Liverpool Adelphi Case* (1): "directly connected with the contract with the wife," and "the means of effecting it" and "parcel of the same transaction." The interpretation of these words may be gathered from the subsequent stream of authority. First, the contract induced by the fraud must be a contract with the wife. Secondly, that contract must be if not the purpose and object of the transaction at all events one without the conclusion of which the transaction would not normally have had effect. The Court must in every case be able to see that, through the introduction of the element of fraud, there is not in real substance being imposed upon a married woman the burden of a contract which by law was not binding upon her.

Now in the present case, no negotiation of any contract with the respondent's wife was ever in progress at all. The contract which the plaintiffs supposed they had made here was a contract with the husband. It was that contract into which they were induced to enter by the fraud of the wife. No other contract was ever at any moment in the mind of any of the parties to this transaction. And the fraud of the wife in relation to that contract was as naked as it could be. If the question were asked: "Would this married woman if made liable for this fraud thereby be deprived wrongly of the protection which the law throws round her in respect of contracts made during coverture?" there could so far, I conceive, be only one answer.

But then it is said that this fraud and imposition of this married woman, elemental as it is, can, and therefore, for the present purpose, ought to be regarded in another light altogether, and be described in another way. This statement of hers was contractual. It was that rather than a deliberate lie. It was a warranty that she had authority to make this contract of loan on her husband's behalf. If by calling it a fraud—fraud though it be—she is made liable for it, the result

(1) 9 Ex. 422, 429.

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will be to deprive her of the protection the law gives her in respect of a warranty when broken. In other words this is a case to which the principle of *Collen* v. *Wright* (1) is applicable.

I will say a word later as to the exceptional refinement involved in introducing that principle for the purpose of relieving a married woman from the consequences of what, apart from its application, would be a naked fraud. I proceed now to give what the authorities, I think, justify me in saying is the true answer to this view of the case. That answer is that when it is shown that in relation to the real transaction a married woman has been guilty of a naked fraud she will not be relieved from its consequences merely because on a minute investigation of all the circumstances it may be found possible to frame against her that which would be a liability in contract. I am content to justify this statement and to rest my own conclusion on this point by a reference to the judgment of Collins L.J. (as he then was) in *Earle* v. *Kingscote*. (2) He states the point very plainly. After saying that a qualification was put on the general rule, so far as regarded frauds of married women or other torts embraced in contracts, he proceeds (3): "It was said that where you cannot separate the fraud or other tort in respect of which you are suing from the contract, you cannot, by framing your statement of claim in the shape of tort, turn that which is essentially in its main features contract into tort so as to let in the liability of the husband where the two are inextricably mixed together. You can only treat it in point of law as a contract, and not as a tort. You cannot let in the liability of the husband by turning that which is essentially contract into tort in the mode stated. But," he goes on, "that principle certainly does not and ought not to apply where the real substance and gist of the matter is in fact a tort and would naturally and properly be expressed as a tort, though by ingenuity it might be framed into a statement of a contract—a contract which in point of fact never really

(1) 8 E. & B. 647. (2) [1900] 2 Ch. 585.
(3) [1900] 2 Ch. 591.

existed, but which would be alleged as an academical statement by an ingenious pleader so as conceivably to cover the circumstances of the case." Later on the Lord Justice says (1): "If you are going to turn a statement, false in fact and followed by acts on the part of the plaintiff, into contract, I am unable to see, and counsel were unable to suggest, any form of fraud or fraudulent misstatement of facts, followed by any act on the part of the person to whom they were made, that might not, to some extent, as in the instance before us, be shaped into the form of contract. If that were so, the effect would be to simply wipe out fraud as one of the torts for which the husband would be liable if the wife committed it. That seems to me impossible, having regard to the great strength of the authorities from very early times, which have laid down that the husband is liable for the fraud as well as for other torts of the wife." To my mind these words are extraordinarily applicable to the facts of this case. It is proposed to introduce into this fraud of the wife the principle of *Collen* v. *Wright* (2), a case not decided until three years after the *Liverpool Adelphi Case* (3) on which the modern law on this subject is based. The contract of warranty there first evolved was in the nature of a legal fiction invented to enable the Court to do justice where fraud was absent. It is proposed now to introduce that principle and to apply it to the statements of the respondent's wife where fraud is present and where recourse to *Collen* v. *Wright* (2) is quite unnecessary. In my judgment this is not permissible. The Court does not I think in these cases seek diligently for some trace of a broken contract in order to relieve a married woman from liability for a plain and deliberate fraud, having itself no connection with any contract of her own. I would venture to take by way of illustration a case I put to counsel in argument. Suppose that the defendant Mrs. Porter had simply cheated the plaintiffs out of their money by telling them some lie in no way connected with her husband. In that case the plaintiffs could have sued for the money, in the form of a claim for damages for fraud,

(1) [1909] 2 Ch. 593. (2) 8 E. & B. 647. (3) 9 Ex. 422.

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both husband and wife. Would it be a defence to that action for the defendants to plead that, inasmuch as on the facts alleged it was open to the plaintiffs to waive the fraud and sue the wife in assumpsit in an action which must have failed if judgment were given against her in the fraud action that would in substance have the effect of depriving her of her defence in assumpsit? Mr. Thorn Drury hesitated to contend that that would be a good plea. But in what way does that case differ from the present? The plaintiffs here might, on the facts, have waived the fraud and unsuccessfully sued the wife for breach of warranty. Does the inevitable issue of that second action prevent judgment being entered for the plaintiffs in the first? I am of opinion that that cannot be so, and for the reason that no Court could say that in the circumstances of this case, entering judgment in the first action was either in form or in substance an indirect method of making this married woman liable on a contract unenforceable against her. What we are confronted with here is essentially a tort and is in no real sense a contract at all: there is here nothing from which, so far as I can see, protection would at any time have been extended to the wife.

For these reasons I am of opinion that the appellants in this case are entitled to judgment as well against the husband as against his wife.

I would be for allowing this appeal.

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In the judgment just delivered in *Edwards* v. *Porter* I have discussed the principles with reference to which, as it seems to me, cases of this kind ought to be decided. I can deal therefore very shortly with this appeal.

The case appears to me to be a simpler one than *Edwards* v. *Porter*. The contractual obligations of the wife are here even more shadowy. They are of a character which never yet, so far as counsel can discover, have been made the subject of an action. He can only say with reference to them that in principle there is no reason why they should not exist and as against persons of capacity be enforceable.

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In the present case the wife in question, Mrs. McNeall, in effect forged the signature of her husband to a document which she handed to one Holmes to enable him by means of it to obtain for himself a loan from Mr. Hawes. Holmes handed to Hawes the document with the husband's forged signature upon it, together with the policy on Mr. McNeall's life to which reference was made in the document, and on the faith of that signature Hawes made the loan to Holmes which is now entirely irrecoverable.

That Mrs. McNeall has been guilty of a gross fraud upon Mr. Hawes is not disputed, and that she and her husband were responsible to him in the damages awarded by the learned judge was not at the end contested by Mr. Barrington Ward so far as this Court was concerned except upon one ground—namely, that as the result of the extension of the doctrine of *Collen* v. *Wright* (1) in *Starkey* v. *Bank of England* (2) Mrs. McNeall incurred in the course of the negotiation a liability to Hawes in contract which put her fraud amongst the excepted frauds referred to in the *Liverpool Adelphi Case* (3) and *Wright* v. *Leonard*. (4)

Now it will I think be agreed that that is a strong proposition. In this transaction Mrs. McNeall, so far as Hawes was concerned, was a non-existent person. So far as he knew or saw or believed, no one took any part in the transaction of this loan to Holmes, except Mr. McNeall, Holmes and himself. Mrs. McNeall played no part in it at all. The principle of *Collen* v. *Wright* (1) in other words is extended to a person unknown in the transaction or otherwise to the promisee, and between these two a consensual relation is thereby established. Putting the position in another way, the principle of *Collen* v. *Wright* (1) is extended to enable an action, consensual in its nature, to be brought against a successful forger by one victimized by his skill. It may be that such an action will lie. I do not feel called upon to decide that question one way or the other. I would only observe with reference to it that *Starkey* v. *Bank of England* (2) does

(1) 8 E. & B. 647.
(2) [1903] A. C. 114.
(3) 9 Ex. 422.
(4) 11 C. B. (N. S.) 258.

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not of itself seem to me to solve it. That case would be a complete authority if Holmes and not Mrs. McNeall were the defendant to this counterclaim. The person who in *Starkey's Case* (1) corresponded to Mrs. McNeall was F. W. Oliver. He was not, nor was his estate, a defendant. Starkey, except that he was honest, whereas Holmes in this case was not, corresponded to Holmes, and he was the defendant made liable. It may be that F. W. Oliver could also in that case have been made liable consensually had he been sued. It is however, I think, pretty clear that he could only have been made liable in such a form of action on grounds different from those which were urged against Starkey.

But I need not pursue this matter further. My opinion in this case, as in the case of *Edwards* v. *Porter*, is that even if some kind of consensual obligation can be extracted from the facts as having been entered into by Mrs. McNeall, it is not of such a character as will in this case excuse either her or her husband from the otherwise naked fraud, of which she was guilty.

In my judgment the learned judge in this case was right and the appeal should be dismissed. There was, however, so far as I can see, no ground on which the learned judge could deprive the appellant of the costs of his successful action to recover his policy. I would be for varying the learned judge's order in that respect.

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Appeal dismissed.

Solicitors for appellants: *C. Butcher & Simon Burns.*
Solicitors for respondent: *Sewell, Edwards & Nevill.*

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Appeal allowed.

Solicitors for appellant: *Cross & Sons.*
Solicitors for respondents: *Fladgate & Co.*

(1) [1903] A. C. 114.

W. H. G.

INLAND REVENUE COMMISSIONERS *v.* HUNI.

1923
May 1, 2.

Revenue—Income Tax—Super Tax—Notice requiring Return of Income to be made—Service by Post abroad on a Non-resident—Validity of Service—Assessment in Default of Return—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 66, 72.

A notice under s. 72, sub-s. 2, of the Finance (1909-10) Act, 1910, requiring the person served to make a return of his income for the purposes of super tax, and also a notice of assessment to super tax when made, can be validly served by post on a non-resident out of the United Kingdom.

Case stated by Special Commissioners for the Income Tax Acts.

At a meeting of the Special Commissioners held on November 22, 1921, the respondent, Mr. E. R. Huni, appealed against an assessment to super tax in the sum of 4000*l.* for the year ending April 5, 1918, made upon him under the provisions of the Income Tax Acts.

The respondent was a managing director of Huni and Wormser, Ld., hereinafter referred to as the company, and had a substantial holding of shares in that company.

The company was incorporated, carried on its business, and was resident in the United Kingdom. It dealt in grain, and its principal operations were in the Argentine. It had offices in Antwerp and London except during the war, when the Antwerp office was closed. It was assessed to British income tax on the whole of its profits under Case I. of Sch. D.

The respondent was in receipt of substantial sums by way of dividend on his shares, such dividends being paid out of the profits of the company which had borne income tax.

The respondent was of Swiss nationality and resided in Paris, and during the year 1917–18 he had no place of residence in the United Kingdom and carried on no business there. He only came to the United Kingdom during most years on one or two visits of two or three days' duration, and during those visits he attended general meetings of the company.

Notice requiring the respondent to make a return of his

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income for the purposes of assessment to super tax was sent by registered post from the office of the Special Commissioners of Income Tax to the respondent's Paris address. No return was made, and the Special Commissioners made an assessment to super tax for the year ending April 5, 1918, according to the best of their judgment in the sum of 4000*l.* under the provisions of s. 72, sub-s. 5, of the Finance (1909–10) Act, 1910. Notice of the assessment was sent by registered post to the respondent at his Paris address on February 2, 1921. Notice of appeal on the respondent's behalf against the assessment was subsequently given to the Special Commissioners.

It was contended on behalf of the respondent: (1.) that s. 72 of the Finance (1909–10) Act, 1910, gave no statutory jurisdiction to serve outside the United Kingdom a notice to make a return of income for the purposes of super tax, and there was, therefore, no valid service of the notice to make such a return in the present case; (2.) that the respondent's notice of appeal given under protest did not make the service of the notice to make a return valid; (3.) that consequently the respondent had not failed to make a return, and the jurisdiction of the Special Commissioners to make an assessment to the best of their judgment under s. 72, sub-s. 5, had not arisen; (4.) that the notice of assessment also could not be served outside the United Kingdom; and (5.) that the assessment should accordingly be discharged. Reference was made to *In re Busfield* (1) and *Rasch & Co.* v. *Wulfert.* (2)

It was contended on behalf of the Crown (inter alia) (1.) that the notice to make a return and the notice of assessment were both valid and validly served; and (2.) that the assessment was valid and should be confirmed. Reference was made to *Brooke* v. *Inland Revenue Commissioners* (3); *In re King & Co.'s Trade Mark* (4); *Fowler* v. *Barstow* (5) and *Beddington* v. *Beddington.* (6)

The Special Commissioners, having considered the facts

(1) (1886) 32 Ch. D. 123.
(2) [1904] 1 K. B. 118.
(3) [1917] 1 K. B. 61; [1918] 1 K. B. 257; 7 Tax Cas. 261.
(4) [1892] 2 Ch. 462.
(5) (1881) 20 Ch. D. 240.
(6) (1876) 1 P. D. 426.

and arguments, upheld the respondent's contentions, and accordingly discharged the assessment.

The appellants immediately upon the determination of the appeal declared to the Commissioners their dissatisfaction therewith as being erroneous in point of law and in due course required the Commissioners to state a case for the opinion of the High Court pursuant to the Finance (1909–10) Act, 1910, s. 72, sub-s. 6, and the Taxes Management Act, 1880, s. 59, which case the Commissioners stated and signed accordingly.

R. P. Hills (*Sir Thomas Inskip S.-G.* with him) for the Crown. The Finance (1909–10) Act, 1910, which imposes super tax, gives jurisdiction to serve a notice upon persons resident abroad requiring them to make a return of their income. Sect. 66 provides that there shall be charged in respect of the income of any individual above a certain amount an additional duty of income tax. By s. 72, sub-s. 1, super tax is to be assessed and charged by the Commissioners for the Special Purposes of the Income Tax Acts. Under sub-s. 2 it is the duty of every person upon whom notice is served in manner prescribed by regulations under that section by the Special Commissioners requiring him to make a return of his income from all sources to make such a return. Under sub-s. 3 it is the duty of every person chargeable with super tax to give notice that he is chargeable to the Special Commissioners. Under sub-s. 4 if any person without reasonable excuse fails to make a return or to give the notice he shall be liable to a penalty. Under sub-s. 5 if any person fails to make a return the Special Commissioners may make an assessment of super tax to the best of their judgment. Sub-s. 8 provides that "the Commissioners may make regulations for the purpose of carrying this section into effect." The regulations made by the Commissioners provide that "any notice required to be served on any person under these regulations may be . . . . sent by post by (prepaid) registered letter addressed to such person at his usual or last known place of abode, and such service shall be deemed sufficient

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service for the purpose of these regulations." It was held by Atkin J. in *Brooke* v. *Inland Revenue Commissioners* (1) that non-residents are chargeable with super tax in respect of all that property in respect of which they are chargeable with income tax. That decision was affirmed by the Court of Appeal, where Swinfen Eady L.J. said (2): "the statute itself which imposes super tax contains the indications to which I have drawn attention that the tax is to be charged upon and paid by persons resident abroad as well as by persons resident in this country." As the Legislature have imposed super tax upon a person resident out of the realm, the question as to the serving of a notice upon him requiring him to make a return of his income is merely a subordinate question and the section providing for the service of the notice is mere machinery which ought to be liberally construed so as to make the tax collectable. Lord Herschell in *Colquhoun* v. *Brooks* (3) negatived the contention that the construction contended for by the Crown involved a violation of international law as subjecting foreigners to taxation here, and pointed out that the Income Tax Acts themselves imposed a territorial limit; "either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there." The Commissioners in serving the notice upon the respondent were merely acting ministerially by giving notice to the taxpayer of the duty which lay upon him to make a return of his income. No one is subjected to a penalty by being served with a notice to make a return. Before a penalty could be imposed upon the person served for not making a return he would have to be brought before a Court. There is a great distinction between serving this notice and serving a writ. Rules of Court provide the formalities necessary for service of a writ abroad and those formalities have to be strictly complied with. The cases dealing with the service of writs abroad have therefore no application. It was held

(1) [1917] 1 K. B. 61, 69; 7 Tax Cas. 261, 268.
(2) [1918] 1 K. B. 257, 267 7 Tax Cas. 273.
(3) (1889) 14 App. Cas. 493, 504; 2 Tax Cas. 490, 499.

in *In re King & Co.'s Trade Mark* (1) that as no special procedure is prescribed as to the service on parties interested of an application to expunge a trade mark it was sufficient if such notice was given as was required by natural justice. In that case the person was domiciled in Ireland out of the jurisdiction of the English Courts and therefore could not be served with a notice of motion, and it was held sufficient to send him a copy of the notice of motion with a letter informing him that proceedings had been commenced which might affect his interests. It will be contended that inasmuch as s. 72 incorporates s. 41 of the Income Tax Act, 1842, which provides that persons non-resident in the United Kingdom shall be chargeable in the name of an agent, that the Inland Revenue were bound to adopt that method and tax the respondent in the name of an agent. But it has been held that s. 41 is a collecting and not a taxing section and ought to receive a liberal interpretation—*Drummond* v. *Collins* (2) —and that it was intended to aid the Commissioners in recovering the tax, and not to alter the incidence of taxation in any way. If the principal could be got at there was no need to have recourse to s. 41: *Tischler* v. *Apthorpe* (3); *Werle & Co.* v. *Colquhoun* (4); *Rex* v. *Income Tax Commissioners*; *Ex parte Huxley*. (5)

Latter K.C. and *Cyril King* for the respondent. A non-resident cannot be served abroad with a notice under s. 72 of the Finance (1909–10) Act, 1910, requiring him to make a return of his income for the purposes of super tax. In sub-s. 2 a non-resident is coupled with incapacitated and deceased persons as to whom service is to be made upon the trustee, guardian, tutor, curator or agent of such person under s. 41 of the Income Tax Act, 1842. If a notice can be sent to a non-resident abroad that provision is unnecessary. The assessment to super tax under s. 72 of the Act of 1910 is limited to cases where the notice can be lawfully served.

(1) [1892] 2 Ch. 462.
(2) [1915] A. C. 1011; 6 Tax Cas. 525.
(3) (1885) 2 Tax Cas. 89.
(4) (1888) 20 Q. B. D. 753; 2 Tax Cas. 402.
(5) [1916] 1 K. B. 788; 7 Tax Cas. 49.

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It is only in the event of a failure to make a return in compliance with the notice that liability to a penalty under sub-s. 4, or the right of the Commissioners under sub-s. 5 to make an assessment to the best of their judgment, arises.

[ROWLATT J. Sub-s. 3 of s. 72 puts a duty upon every person chargeable with super tax to give notice to the Commissioners that he is chargeable whether he is served with a notice or not.]

Failure to give notice does not give jurisdiction to the Commissioners to make an assessment under sub-s. 5. That jurisdiction is limited to cases of failure to make a return. The notice is not a document which merely gives information to the person upon whom it is served, because a failure to make a return in compliance with the notice renders the person served liable to a penalty and to assessment, therefore it is a document which founds a jurisdiction to assessment and a liability of a serious character. There is no statute authorizing the service of the notice out of the United Kingdom. In default of such a statutory enactment there is no jurisdiction to serve the notice out of the jurisdiction: *Rasch & Co.* v. *Wulfert.* (1) It was held in *In re Busfield* (2) that an originating summons cannot be served out of the jurisdiction and in *In re Anglo-African Steamship Co.* (3) that notices of orders and other proceedings in the winding up of a company cannot be served on persons residing out of the jurisdiction. In *Weldon* v. *Gounod* (4), where the plaintiff had obtained judgment against the defendant, a foreigner resident out of the jurisdiction, it was held that he Court had no jurisdiction to grant leave to serve a summons on the defendant out of the jurisdiction calling upon him to show cause why a receiver should not be appointed. The provision in the regulations made by the Commissioners as to the service of a notice by post refers to service within the jurisdiction and does not mean that service can be made by post out of the jurisdiction. Atkin J. in *Brooke* v. *Inland*

(1) [1904] 1 K. B. 118.
(2) 32 Ch. D. 123.
(3) (1886) 32 Ch. D. 348.
(4) (1885) 15 Q. B. D. 622.

Revenue Commissioners (1) said that it was not necessary in that case to decide whether notice to make a return and notice of assessment when made can be given to a non-resident; and Scrutton L.J. in the same case in the Court of Appeal (2) said that he limited himself to the exact facts of the case and therefore neither judge purported to decide the point. The principle is that "English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English Court to give effect to an English statute, is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or short time, have made themselves during that time subject to English jurisdiction": per James L.J. in *Ex parte Blain.* (3) The serving of the notice is a means of bringing the person served before the Commissioners and so to constitute a Crown debt for which he can be sued. The assessment of the Commissioners if not appealed against is final and conclusive: see Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), ss. 162, 175, 176, and would give rise to a Crown debt. In the case of a Crown debt there is power under the Crown Suits Act, 1865 (28 & 29 Vict. c. 104), s. 37, for the service of a writ out of the jurisdiction.

R. P. Hills in reply. The cases cited refer to the service of orders of Court out of the jurisdiction, as to which there are strict rules to be observed, but this notice is very different from an order of Court. The Act of 1910 has in the plainest terms rendered persons who are non-resident liable to super tax, and the serving of the notice is merely the machinery by which the jurisdiction already established is carried out.

ROWLATT J. In this case the question is as to the machinery which is available for levying super tax upon non-residents primarily. The facts are that Mr. Huni had shares in an English company. He was a Swiss and not a subject of this realm. He was not resident here, and, so far as I know,

(1) [1917] 1 K. B. 61, 69. (2) [1918] 1 K. B. 257, 269.
(3) (1879) 12 Ch. D. 522, 526.

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he had not at any material time been here. He has however been assessed to super tax on the income from his English shares upon a notice to make a return of his income which he did not comply with, which notice was served upon him by post at his address in Paris. He says that that service was not justified, that consequently there was no failure to comply with the notice, and it was only if there was a failure to comply with the notice that the Commissioners had jurisdiction to assess him.

Now it has been decided, both in this Court and in the Court of Appeal, that a non-resident is as liable to super tax in respect of his English income as a resident, and that he can be assessed for what it is worth. I say "for what it is worth" because of course he may be liable to super tax without having a penny in this country, because super tax is not assessed upon the income of the year of assessment but upon the income of the previous year, and it may be that a non-resident and a foreigner may be assessed to super tax, although in the year of assessment he has no property in this country at all. But the question is whether in this case the machinery has failed the Revenue. There is a provision which is applicable to super tax which enables the Revenue authorities to assess a person who is abroad in the name of his agent. I do not think that provision throws much light upon this question, because it has been held several times that that provision is in augmentation of the powers of the Revenue and not in limitation of them. If the person chargeable can be served the necessary steps can be taken against him personally without troubling about an agent, even though he has an agent, and if he has no agent that is the only way it can be done.

The Finance (1909–1910) Act, 1910, s. 72, is absolute in its terms. It provides for the service of this notice, and under regulations which have been made by the Commissioners service by post to the person's usual or last known place of abode is sufficient. The effect of the service of that notice is this: the statute says that the person to whom it is addressed shall make a return, and, independently of the notice, if he is

liable to super tax it is his duty to make a return, so that any one who is served with a notice wherever he is, and any one, wherever he is, who is chargeable to super tax by reason of having the year before had an income here, is bound, according to the terms of the statute, to make a return or to give notice as the case may be. The effect of not making the return or of not giving the notice is to render him liable to a penalty. But there is another effect of not making a return—it is not so in the case of failure to give the notice—namely, that the person served may be assessed by the Special Commissioners according to the best of their judgment. The only question here is whether the provisions of the section are to be cut down as a matter of construction so as to prevent them authorizing the service of this notice. I am not certain that it does not come down to this: whether an address out of the realm is an address within the meaning of the regulation made by the Commissioners under the statute.

A great deal has been said in the course of the argument about the liability of a non-resident and an alien, but I think that I have to deal with the question as to the operation of this statute without the realm. I do not suppose that a resident and an Englishman often have to be served with a notice under this section by post abroad, but the question in such a case would be the same question. In the statute no distinction is drawn between aliens, residents and non-residents. The question therefore is whether the statute is to be cut down so as to prevent these notices being served abroad. The principle is that Acts of Parliament are prima facie not to be construed so as to assume jurisdiction without the realm. And when it comes to a question of imposing a duty or creating an offence abroad, both of which can be done by Parliament, at all events in the case of British subjects, the Courts are bound to look narrowly at the statute to see whether that is what is meant. But no difficulty of that sort arises if what the statute really directs is the mere service of a notice, and nothing more. There is no international difficulty involved in serving a notice abroad, so

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that if a statute said that a person was to have a notice of dishonour of a bill served upon him abroad, or a similar kind of notice, it could not be suggested that any difficulty would arise. The notice may have consequences, but all the same it is a mere notice, and the question really is whether that is the way I ought to look at this case.

The respondent says that the notice of assessment is bad too, because it was served upon him abroad. That contention however I cannot accept. If a man has been validly assessed in England I cannot conceive what principle of international law is to be invoked to limit the words of the statute which says that he may be told that he has been assessed. But the notice to deliver a return is put in a different light; it is said that the service of that notice was the initiation of proceedings against the respondent, creating a duty to appear or something of that sort, and also a liability to a penalty if he does not. Now it seems to me that the machinery created by this section has several aspects. It may lead to the commission of an offence. What effect that has abroad it is not for me to say now. It creates a duty. What the result of that is as such I do not know, and I am not called upon to say. But I think it also operates as a notice and no more. If a separate section had been framed in somewhat less imperative language it could have been made quite clear. I think however there is involved in this machinery the mere giving of a notice as a preliminary to the Commissioners proceeding to do something which they are entitled to do with regard to the respondent in respect of his present or past property in this country, and that I ought not to limit the words of the statute so as to make this notice as a mere notice null and void.

In the argument one was referred to several cases with regard to writs. If this was a judicial process emanating against the respondent there would be a great deal to be said for that sort of analogy. I do not think it is a judicial process. I look at the statute, which contains plain words. I appreciate the arguments advanced in favour of limiting them, but I do not think that the arguments show that the words of the

statute must necessarily be limited. That being so I do not think I can limit them, and therefore I must allow the appeal and give judgment for the Crown.

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Judgment for Crown.

Solicitor for Crown: *Solicitor to Inland Revenue.*

Solicitors for respondent: *Nisbet, Drew & Loughborough.*

R. F. S.

CALTHORPE *v.* McOSCAR AND OTHERS.

1923

April 16; *May* 10.

[1920. A. 782.]

Landlord and Tenant—Lease—Covenant—"Well and sufficiently repair"—Long Lease—Determination—Alteration in District—Change in Character of Tenants—Extent of Obligation under Covenant.

A lease dated in 1825 of three houses in Middlesex, which were then new, for ninety-five years as from June, 1824, contained a covenant that the lessee, his executors, administrators and assigns, should "well and sufficiently repair" and keep the said houses and yield up the same so repaired and kept at the determination of the term. At the beginning of the term the district was semi-rural and the houses were country houses; but with the growth of population the district changed, and at the end of the term it had become a central part of London and the houses or parts of them could then be sub-let to small tenants only. In an action brought at the determination of the term to enforce the covenant against the successors in title of the original lessee:—

Held, that the obligation of the defendants under the covenant was to do such repairs only as having regard to the age, character, and locality of the houses would make them reasonably fit for the occupation of reasonably minded tenants of the class who would be likely to take them.

Proudfoot v. *Hart* (1890) 25 Q. B. D. 42 held applicable.

In a covenant by the tenant of a house to keep it in repair the word "repair" by itself denotes all that is implied by that word together with any of the adjectives "good," "proper," "substantial," "sufficient," "necessary," or "tenantable."

CASE stated by an arbitrator.

On May 21, 1920, the action was brought by the plaintiff, the Hon. Rachel Anstruther-Gough-Calthorpe, a married woman, against the defendant Laura McOscar, with whom

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a second defendant was afterwards joined, for damages for alleged breach of a repairing covenant contained in a lease granted by the Rt. Hon. George, Lord Calthorpe, the predecessor in title of the plaintiff, to Nathaniel Stallwood, the predecessor in title of the defendants, dated March 2, 1825, of three houses therein described and since known as Nos. 17, 19 and 21, Calthorpe Street, Gray's Inn Road, in the county of Middlesex, for the term of ninety-five years from June 24, 1824. The terms of the covenant are set out below in the judgment of McCardie J.

On November 3, 1922, an order was made in the action by consent that Mr. Arthur Frederick Brown, of Westminster, a surveyor, should be appointed as arbitrator to assess the amount of damages for which final judgment should be signed in the action, and that the plaintiff should be at liberty to sign final judgment for the amount so ascertained.

On February 12, 1923, the arbitrator made his award in the form of a special case subject to the opinion of the Court. The award stated that it was not disputed that the measure of damages to be recovered by the plaintiff for breaches of the covenant to repair was the costs of the repairs rendered necessary when the term ended in June, 1919, by reason of the defendants not having performed the said covenant; that the parties differed as to the nature and extent of the repairs that were necessary for the due performance of the covenant; that the defendants contended that the effect of the covenant was limited to the extent of imposing an obligation to carry out such repairs only as, having regard to the age, character and locality of the premises would make them reasonably fit to satisfy the requirements of reasonably minded tenants of the class that would be likely to occupy them and that the cost of the work necessary for that purpose was the measure of damages; that the plaintiff contended that the true effect of the covenant was to render the defendants responsible to do all needful and necessary acts well and sufficiently to repair the premises in the words of the covenant without limitation to such repairs as would satisfy the requirements of

reasonably minded persons of the class likely to become occupiers of the premises; that the arbitrator found as a fact that the tenants likely to occupy the premises would only take the houses separately, or only part of a house, for short terms on weekly, monthly, or quarterly tenancies, and would not accept any repairing obligations and that the requirements of reasonably minded tenants of such class would not include many repairs which in the arbitrator's opinion were needful and necessary for the repair and maintenance of the property; that if the plaintiff's contention was correct, then, making due allowance for the age of the premises and the change in the residential character of the locality brought about in the century that had elapsed since the lease was granted, the arbitrator estimated the cost of the repairs which were needful and necessary at 586*l.*, and he assessed the damages at that sum; but that if the defendants' contention was correct the arbitrator estimated the cost of the repairs at 220*l.* and assessed the damages at that sum.

F. Hinde for the plaintiff.

W. Banks for the defendants.

The nature of the arguments and all the principal authorities cited in the course of them appear from the judgment of the learned judge. The following additional cases and statute were also referred to: *Soward* v. *Leggatt* (1); *Haldane* v. *Newcomb* (2); *Moxon* v. *Marquis Townshend* (3); *In re Romford Guardians and Withers* (4); and the Leases Act, 1845 (8 & 9 Vict. c. 124), s. 1, Schedule.

May 10. McCARDIE J. In this case the plaintiff brought an action against the defendants for breach of the repairing covenants contained in a lease. By order dated November 3, 1922, an arbitrator was appointed to assess the amount of damages for which final judgment was to be signed. The arbitrator, a surveyor, has stated this case for the opinion of

(1) (1836) 7 Car. & P. 613.

(2) (1863) 12 W. R. 135; 9 L. T. 420.

(3) (1886–7) 2 Times L. R. 717; 3 Ibid. 392.

(4) (1918) 144 L. T. J. 197.

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the Court. The point at issue is as to the true measure of damages.

The facts are these: the plaintiff is the successor in title of Lord Calthorpe who, by lease dated March 2, 1825, demised to the defendants' predecessors in title three houses known as Nos. 17, 19 and 21, Calthorpe Street, Gray's Inn Road, in the county of Middlesex. The houses, it is admitted, were then newly erected. The term was for ninety-five years from June, 1824, and it therefore expired in June, 1919. The lease provided that the lessee, his executors, administrators and assigns should "from time to time and as often as occasion should require, during the said term, well and sufficiently repair, support, uphold, maintain, paint, pave, empty, scour, cleanse, amend and keep, the said three several messuages and buildings thereby demised and all such other buildings as should during the said term thereby granted, be erected upon the said ground and premises thereby demised and all the walls, fences, pavements, vaults, cellars, sinks, privies, sewers, drains, water courses, and other appertenances belonging or to belong thereto in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever and the said messuages, buildings, and premises, with their appertenances so being in all things well and sufficiently repaired, supported, upheld, maintained, painted, paved, emptied, scoured, cleaned, amended and kept as aforesaid at the end or sooner determination of the said term thereby granted should and would peaceably and quietly leave, surrender and yield up." Such is the covenant. Upon the expiry of the term in 1919, the parties differed to a serious degree as to the nature and extent of the repairs required for the due performance of the covenant. The difference is clearly shown by the figures stated by the arbitrator. If the landlord's contention of law be right he gets judgment for 586*l*. If the tenant's contention be correct, then the landlord gets judgment for 220*l*. only.

The legal dispute between them is this: the landlord contends that the true effect of the covenant is to make the tenant liable for all needful and necessary acts required

to "well and sufficiently repair," etc., the premises as stated by the covenant, without limiting those repairs to such as would satisfy the requirements of reasonably minded persons of the class likely to become occupiers of the premises. The tenant contends, on the other hand, that the covenant only throws upon him the burden of such repairs as, having regard to the age, character, and locality of the premises, would make them reasonably fit for the occupation of reasonably minded tenants of the class who would be likely to take them. This contention of the tenant rests on the words of the Court of Appeal in the well known case of *Proudfoot* v. *Hart*. (1)

The difference between the landlord's view and the tenant's view is shown in the most vivid fashion by the difference between the respective estimates of 586*l*. and 220*l*. The divergence is remarkable.

The lease is not unusual in its wording. The facts, apart from the differing figures, are often arising. The question at issue is therefore of direct and general importance. Upon the question of fact the arbitrator says: "I find as a fact that the tenants likely to occupy the premises would only take the houses separately, or only part of a house, for short terms on weekly, monthly or quarterly tenancies, and would not accept any repairing obligations and that the requirements of reasonably minded tenants of such class would not include many repairs which in my opinion were needful and necessary for the repair and maintenance of the property." The standard of the surveyor is therefore one thing. The standard of the reasonably minded tenant seems to be a different thing. Nothing else can account for the striking disparity between 586*l*. and 220*l*. There is no other finding of fact than that already mentioned. Exerting common knowledge I presume that the meaning of the matter is this. In 1825 the three houses in the Gray's Inn Road were country abodes. Gray's Inn Road was then a semi-rural area; with the growth of population it has slowly changed. It is now a busy and central part of a great city. The three houses or parts of them

(1) 25 Q. B. D. 42.

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will now be let to small tenants who have their occupation around. The houses have become old. A century of time has done its work. The movement of events has wrought many changes.

Now upon the circumstances before me which contention is right? Is the landlord to get 586*l.* or only 220*l.*? It would seem impossible, in view of the profusion of case law, that the question, as one of law, should now call for decision. In view, however, of the able arguments of Mr. Hinde for the landlord and Mr. W. Banks for the lessee I am bound to say that I have found the question difficult. The case law is in a confused state. Vagueness sometimes deepens into obscurity. I have read many decisions, and my difficulties have not been solved to my full satisfaction.

Inasmuch as the contention of the tenant rests on the Court of Appeal decision in *Proudfoot* v. *Hart* (1) it is best to state the effect of that case at once. The headnote is concise and correct. It is this: "Under an agreement to keep a house in 'good tenantable repair,' and so leave the same at the expiration of the term, the tenant's obligation is to put and keep the premises in such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it." This seems quite simple until it be asked whether that decision turned on the words "tenantable repair" or upon particular facts and whether it be consistent with earlier and later judgments. I think that the profession has usually treated *Proudfoot* v. *Hart* (1) as of wide application and as independent of the particular words of the covenant. Mr. Hinde, however, for the landlord here, strongly contends that *Proudfoot* v. *Hart* (1) turns on particular words and particular facts, and has no breadth of application.

Now what is the covenant here? It is a general one. It contains the words "well and sufficiently repair," it refers to supporting, maintaining, painting and the like. But it is not an unusual covenant. Many thousands of leases have

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been drawn in the same form. It is proper to point out that there are no express detailed covenants, for example, to paint every sixth year: see Foà on Landlord and Tenant, 5th ed., pp. 220 and 225. It seems necessary to remember that although the words of the covenant did not vary with the lapse of years, yet the subject matter of the covenant changed greatly. Here, when the lease expired in 1919, the three houses in question had become old houses. The covenant had to be applied to the houses as they stood in that year. This being so, it is desirable to now mention several points.

Firstly, there is no question here of premises which were old when demised: see *Payne* v. *Haine* (1) and *Lister* v. *Lane*. (2)

Secondly, in any event the covenant must be construed with moderation and not with severity. Repair and not perfection is the test. In *Stanley* v. *Towgood* (3) the words were "good and tenantable order and repair," and the Court held that the obligation of the tenant was to keep in substantial repair as opposed to trivial matters: see also *Harris* v. *Jones* (4), where the words were "Well and sufficiently repair, uphold," etc., and were strikingly similar to the words in the case now before me, and *Scales* v. *Lawrence* (5), where Willes J. said that, "Such covenants must not be strained, but reasonably construed, on the principle of 'give and take'"; and *Perry* v. *Chotzner* (6), where the covenant was for "good repair" and where Cave J. used emphatic language with respect to the landlord's excessive claim for dilapidations.

Thirdly, the landlord's right to damages is not affected either by the special purpose to which he may intend to put the premises upon the expiration of the term, or by any special arrangement he may have made with a new incoming tenant. Thus he does not lose his right to the full measure of damages, although he immediately proceeds to demolish the building: see *Rawlings* v. *Morgan* (7); nor by the fact

(1) (1847) 16 M. & W. 541.
(2) [1893] 2 Q. B. 212.
(3) (1836) 3 Bing. (N. C.) 4.
(4) (1832) 1 Moo. & Rob. 173.
(5) (1860) 2 F. & F. 289, 291.
(6) (1893) 9 Times L. R. 488.
(7) (1865) 18 C. B. (N. S.) 776.

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that after taking possession he pulls down a part of the premises to make structural alterations: see *Inderwick* v. *Leech*. (1) Nor by the fact that he has relet at a higher rent to a new tenant: see *Joyner* v. *Weeks*. (2) There is also the decision in *Morgan* v. *Hardy* (3), where, owing to damages in the surrounding property and neighbourhood, the house had so far altered in value since the grant of the lease, that it would be as valuable for letting purposes if some of the repairs required by the covenant, according to its strict meaning, were omitted, or executed at a cheaper rate than usual. It was held by Denman J. that such fact did not cut down the landlord's claim to damages. This decision (inter alia) was relied on by Mr. Hinde for the landlord in the present case. I desire, however, to say at once that I agree in substance with the note by Mr. Foà at the foot of p. 230 of the 5th ed. of his work on Landlord and Tenant, where he says: "It should, however, be noticed that this decision was before the rule in *Proudfoot* v. *Hart* (4) was laid down. And it would now seem that the diminution in value of the premises might have some bearing on the damages recoverable, so far as it would tend to lessen the requirements of the reasonably minded incoming tenant of the class likely to take the premises."

Now all the cases I have cited are useful so far as they go. As to the cases cited under the third head (and which were greatly relied on by Mr. Hinde) they show that such an adventitious circumstance as the pulling down of the premises by the landlord does not destroy or lessen his claim to damages. But they throw no real light on the standard of repair to be applied. The question of standard is the difficulty. It is easy to say that the covenant must be fairly construed, and that it must be reasonably applied; but it is necessary to have something more than vague generalities. What is the proper rule of construction? What is the standard of repair required under the circumstances

(1) (1885) 1 Times L. R. 484.
(2) [1891] 2 Q. B. 31.
(3) (1886) 17 Q. B. D. 770; reversed on another point (1887) 18 Q. B. D. 646.
(4) 25 Q. B. D. 42.

(which are so common) now before me? Covenants to repair are infinitely varied in the minutiæ of their wording. Excluding the case of special and express covenants, for example, to paint every six years, does anything turn on the variations of phrase so often found? In other words, does *Proudfoot* v. *Hart* (1) turn on the special words "tenantable repair" as applied to the facts of that case? Mr. Hinde for the landlord here says Yes; Mr. Banks for the tenant says No. Here is a definite and practical point.

I have read, I believe, every reported case which bears upon the matter. In my opinion, after considering all the cases, I think that Mr. Banks for the tenant is right in his contention. I can see no practical distinction between "tenantable repair" and the words of the repairing covenant now before me. It merely happened that the words in question in *Proudfoot's Case* (1) were "tenantable repair." In spite of a variation in the wording of a general covenant to repair yet, so far as I can see, the Courts have applied substantially the same standard.

In *Stanley* v. *Towgood* (2) the words "good and tenantable order and repair" were apparently regarded by Tindal C.J. as similar to the word "repair." In *Belcher* v. *M'Intosh* (3) the words were "habitable repair." Alderson B. indeed said that "the term 'tenantable repair' may have a somewhat different meaning to the term 'habitable repair.'" (4) He omitted to state the distinction. He added, in summing up, that the jury must have regard to the situation of the house and the class of person likely to inhabit it. In *Payne* v. *Haine* (5) the words were "good repair, order and condition." Alderson B. said that those words required the tenant to keep the premises in "good tenantable repair." (6) In *Brown* v. *Trumper* (7) Sir John Romilly M.R. said that the words "well and substantially repair" required the tenant to put the premises into a "tenantable state of repair." In *Cooke*

(1) 25 Q. B. D. 42.
(2) 3 Bing. (N. C.) 4.
(3) (1839) 8 Car. & P. 720.
(4) (1839) 8 Car. & P. 723.
(5) 16 M. & W. 541.
(6) Ibid. 546.
(7) (1858) 26 Beav. 11.

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v. *Cholmondeley* (1) a testator had by his will directed that buildings should be kept in "good repair." Kindersley V.-C. said: "They must be put in such a state of repair as will satisfy a respectable occupant using them fairly; but not in that state of repair which an owner or tenant might fancy." In *Truscott* v. *Diamond Rock Boring Co.* (2) Brett L.J. said that the term "necessary repairs" meant all such repairs as would be necessary to enable the landlord to hand over the property to a new tenant in a substantial and tenantable state of repair. (3) In *Lister* v. *Lane* (4) the Court of Appeal apparently assumed that the words "well sufficiently and substantially repair" bore no stronger meaning than the word "repair" by itself. In *Proudfoot* v. *Hart* (5) Lord Esher M.R. said that "good repair" was much the same thing as "tenantable repair." (6) In *Mosse* v. *Killick* (7) the words "perfect repair" were apparently regarded by Grove J. as involving no more than ordinary repair. Finally, I may cite *Lurcott* v. *Wakely*. (8) In that case Fletcher Moulton L.J. said: "What a surveyor would call in good condition and what a surveyor would call in thorough repair may differ somewhat, but they would be something very like, the one to the other." (9) The learned Lord Justice (who had not I think all the authorities before him) omits to state the nature, if any, of the difference. Earlier in his judgment (10) I observe that he says, "they [the lessees] could not plead that they had performed their contract if they allowed the house to come into a condition in which it was no longer habitable as a house."

Such are some of the cases. In Redman on Landlord and Tenant, 7th ed., at p. 301, the learned author, after quoting several of the varying covenants I have mentioned, says: "None of these expressions have any technical meaning, and it is not clear to what extent they add to the obligation imposed by the word 'repair.'"

(1) (1858) 4 Drew. 326, 328.
(2) (1882) 20 Ch. D. 251.
(3) Ibid. 258.
(4) [1893] 2 Q. B. 212.
(5) 25 Q. B. D. 42.
(6) 25 Q. B. D. 42, 51.
(7) (1881) 50 L. J. (C. P.) 300.
(8) [1911] 1 K. B. 905.
(9) Ibid. 918.
(10) Ibid. 917.

After considering the whole of the cases, I am of opinion that none of the expressions in the various decisions cited by me add anything to the word "repair." That word denotes or connotes all that which is indicated by the words "well," or "proper," or "substantial," or "sufficient," or "good," or "necessary," or "tenantable." This is, I think, a useful and convenient rule to establish, and it is agreeable to the bulk of authority. The view of Mr. Redman, just quoted, seems to agree with that of Mr. Foà, who, in the 5th edition of his work on Landlord and Tenant, says at p. 220: "As regards the general covenant itself, the form in which it may be expressed . . . . is not at the present day regarded as very material," so too in Key & Elphinstone on Conveyancing, 10th ed., vol. i., p. 855, it is stated to be the view of the learned author that "tenantable repair" is substantially the same thing as "good repair." I see nothing in Mayne on Damages, 9th ed., pp. 232 and 233, which conflicts with the opinion I have formed.

For the reasons given I can draw no distinction between the wording of the covenant in *Proudfoot* v. *Hart* (1) and the covenant in the present case. Each rests on the same footing; each is subject to the same construction; each carries with it the same standard of repairs. I hold that *Proudfoot* v. *Hart* (1) did not turn on special words in the covenant there, or on any special facts. I think that it applies to the case now before me. It is admitted and it is clear that the arbitrator in fixing the higher figure of 580*l.* rejected *Proudfoot* v. *Hart* (1) as being inapplicable. But the lower figure—namely, 220*l.*—is admittedly based on the application of *Proudfoot* v. *Hart* (1) to the present covenant and facts. Hence, I think that judgment should be entered for 220*l.* only.

The meaning and working effect of the word "repair" has been stated with reasonable clearness in *Proudfoot* v. *Hart* (1) and *Lurcott* v. *Wakely*. (2) No question was raised before me here as to the details of the arbitrator's figures. The matter has been debated as one of principle only.

In concluding this judgment I desire to point out that

(1) 25 Q. B. D. 42. (2) [1911] 1 K. B. 905.

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Proudfoot v. *Hart* (1) supplies, I think, a useful working rule for the normal covenants to repair, however variously they may be worded. Some standard must be taken. What is it to be ? The notion of the actual owner may be generous or severe. The notion of the actual tenant may be narrow or indulgent. It is well to adopt a practical and general working standard and thus to meet the difficulty arising when landlords and tenants have opposite views with respect to houses which vary greatly in age, description, locality and purpose. Such a standard is provided by *Proudfoot* v. *Hart*. (1) After all, a building is made for occupation. It is for use as a business or residential structure and not as a museum of reparational achievement. If the actual landlord with varying notions is excluded, and the actual tenant with varying notions is also excluded, then a hypothetical person can be taken as supplying the test. That person is well indicated in *Proudfoot* v. *Hart*. (1) He is known as the reasonable person. He is assumed to be the intended occupant. He is reasonably minded. He must not ask too much or accept too little. The notional existence of this person guards equally the interests of landlord and tenant. Exclude him and confusion exists ; adopt him and a working rule is provided.

For the reasons given, I think that judgment here should be entered for 220*l*. only. The consequences indicated in the arbitrator's award will follow this result.

Judgment accordingly.

Solicitors for plaintiff : *Walters & Co.*

Solicitors for defendants : *Ingledew, Davies, Sanders & Brown, for Davies, Sanders & Swanwick, Chesterfield, Derbyshire.*

(1) 25 Q. B. D. 42.

J. R.

BYGRAVES *v.* DICKER.

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April 26.

Hackney Carriage—Alleged Negligence of Driver—Liability of registered Proprietor—Relationship of Master and Servant—Presumption—Town Police Clauses Act, 1847 (10 & 11 *Vict. c.* 89), *ss.* 37–68.

Under the Town Police Clauses Act, 1847, the registered proprietor of a hackney carriage is responsible for the acts of the driver whilst plying for hire, as if the relationship of master and servant existed between them.

Keen v. *Henry* [1894] 1 Q. B. 292 applied.

APPEAL from Brighton County Court.

The plaintiff, James John Bygraves, brought the present action against the defendant, Frederick William Dicker, for damages for personal injuries caused by the alleged negligence of the defendant. The action was brought originally in the King's Bench Division. (1) The plaintiff alleged in his statement of claim that on June 21, 1921, at Freshfield Road, Brighton, he suffered damage from personal injuries caused by the negligent driving or management by the defendant's servant and/or agent of the defendant's motor car, the particulars being as therein stated. The defendant in his defence stated (inter alia) (para. 1) that he denied the alleged negligence; (para. 2) that the negligence, if any, was not caused by any of the acts or matters complained of, and that it arose from inevitable accident, the particulars being that the wheel of the defendant's car struck a large stone in the road which turned it to the near side and caused it to strike the plaintiff; (para. 4) that the alleged damage was denied; and (para. 5) that the driver was not the servant of the defendant, who was not therefore responsible for his negligence, if any.

The action was remitted to the Brighton County Court, and came on for hearing there before the judge and a jury.

On behalf of the plaintiff evidence was given which went to show that, on the date in question, when he was returning from the Brighton races he was knocked down and injured by the negligence of the driver of the car and that he had

(1) [1922. B. 3190.]

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suffered damage. A brother of the plaintiff, who was with him at the time of the accident, stated that he went after the car, caused the driver to stop it, sent for the police, and, in subsequent proceedings in the police court against the driver for being drunk when in charge of the car, heard the now defendant say to the magistrate that the driver had only had three drinks. A police sergeant of the Brighton police force stated that he went to the scene of the accident, that he did not know who was the owner of the taxicab, that he saw the driver, that he had known him before as the driver of the cab, that he took him into custody, that he was convicted at the police court for being drunk in charge of the cab, that he knew the defendant and heard him give evidence at the police court, where he stated that he had had a drink with the driver on the racehill. The licence of the car was produced, from which it appeared that the defendant was the registered proprietor, and that it was licensed to be used as a hackney carriage.

It was submitted on behalf of the plaintiff that as the defendant was the registered proprietor of the car and the driver the licensed driver, the presumption arose under the Town Police Clauses Act, 1847, that the relationship of master and servant existed between the defendant and the driver and that the former was responsible for the acts of the latter in driving the car.

It was submitted on behalf of the defendant that the plaintiff had failed to make out his case.

The county court judge made an offer to the plaintiff to leave to the jury the questions of negligence and of damage, and in the event of the jury finding for the plaintiff on these questions, to reserve the question of the defendant's liability under the Act for further argument. The plaintiff's counsel refused that offer, and the judge then non-suited the plaintiff.

The plaintiff appealed.

Martin O'Connor (*M. O'Sullivan* with him) for the plaintiff. The plaintiff was wrongly non-suited, and there should be a new trial of the action.

The county court judge should not have refused to allow the case to proceed except on the questions of negligence and damages. If the case had proceeded in the ordinary course, the jury, besides finding in the plaintiff's favour on these questions, might have found also that the defendant was in fact the master of the driver and therefore responsible for his negligence, and in that case the plaintiff would have been entitled to judgment.

Further, even if the jury had only found in the plaintiff's favour on the questions of negligence and damages, the plaintiff would have been entitled to judgment. It was proved or admitted at the trial that the taxicab in question was licensed as a hackney carriage under the Town Police Clauses Act, 1847, that the defendant was the registered proprietor, and that the driver was a licensed driver; and on these facts it follows, by virtue of that Act, that the defendant was the master of the driver and responsible for negligence on his part. The part of the Act which relates to hackney carriages—namely, ss. 37 to 68—on its true construction creates the relationship of master and servant between the registered proprietor of a hackney carriage and the licensed driver, and renders the former liable for the acts of the latter. This appears from the general scheme of these sections, and more particularly from ss. 47 and 48, which expressly refer to the proprietor as "employing" the driver, s. 49, which refers to the driver as in the "service" of or as "employed" by the proprietor, and ss. 60 and 63, which appear to treat the driver as the agent of the proprietor. These provisions of the Act of 1847 are in substance identical with the provisions of the London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), under which it has been held in a series of cases beginning with *Powles* v. *Hider* (1) and summed up in *Keen* v. *Henry* (2) that the relationship of master and servant is to be taken to exist between the registered proprietor and the driver of the cab. The plaintiff in his statement of claim in the High Court stated that the driver was the servant or agent of the defendant, and as the defendant in his defence

(1) (1856) 6 E. & B. 207. (2) [1894] 1 Q. B. 292.

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did not deny that allegation, he must by the Rules of the Supreme Court, Order XIX., r. 13, be taken to have admitted that the driver was his agent. If the driver was the agent of the defendant, then, whether he was his servant or not, the defendant was liable for his acts as driver.

E. M. Marx for the defendant. The non-suit was right.

The plaintiff did not prove as matters of fact that the defendant was the owner of the car and that the driver was his servant, and he therefore failed to show that the defendant was liable at common law.

Further, the plaintiff did not prove that the defendant was the registered proprietor of the car under the Towns Police Clauses Act, 1847, and it was therefore premature and irrelevant to inquire whether that Act raises a presumption of the relationship of master and servant between the registered proprietor and the driver of a hackney carriage. That Act does not create that relationship. It is no doubt conclusively established that the London Hackney Carriages Act, 1843, creates that relationship in the cases to which it applies: *Morley* v. *Dunscombe* (1); *Powles* v. *Hider* (2); *Venables* v. *Smith* (3); and *Gates* v. *Bill & Son.* (4) That Act, however, does not apply outside London. Further it may be doubted whether that Act creates the relationship of master and servant between the owner and the driver of a modern taxicab, seeing that there is no presumption that the relationship in fact exists in the case of a taxicab, of which the driver is often a hire-purchaser, and is paid not by a fixed wage but by a proportion of the takings. Moreover, the Court has shown a disinclination to extend the principle of the cases decided under that Act to analogous provisions in other Acts: *Smith* v. *Bailey.* (5) The provisions of the Town Police Clauses Act, 1847, relating to hackney carriages, though similar to, are by no means identical with, those of the London Act of 1843. Thus, s. 35 of the Act of 1843,

(1) (1848) 11 L. T. (O. S.) 199.
(2) (1856) 6 E. & B. 207.
(3) (1877) 2 Q. B. D. 279.
(4) [1902] 2 K. B. 38.
(5) [1891] 2 Q. B. 403.

which provides that where any complaint is made against the driver of a hackney carriage, the proprietor may be summoned to appear and to produce the driver, has no counterpart in the Act of 1847. The provision in s. 10 of the Act of 1843 that a proprietor who knowingly suffers any person not licensed to act as driver shall forfeit 10*l.*; and the proviso to that section that nothing therein shall subject to any penalty a proprietor who shall "employ" an unlicensed person as driver, have no equivalents in the Act of 1847. Sect. 21 of the Act of 1843 speaks of the driver remaining in the "service" of the proprietor, while the corresponding section (s. 48) of the Act of 1847 uses the word "employ," which is less appropriate to the relation of master and servant.

In view of these and other differences between the Acts it cannot be said that the later Act like the earlier Act creates the relation of master and servant between the registered proprietor and the driver of a cab.

LUSH J. In my opinion this appeal should succeed, and there should be a new trial of the action.

The case seems to me to be reasonably clear. The defendant was the registered proprietor of the cab in question and was licensed to use it as a hackney carriage. That statement was made by counsel for the plaintiff in opening his case in the county court and no objection was taken to it on behalf of the defendant. When the plaintiff's case was over an argument took place in regard to the Town Police Clauses Act, 1847, particular reference being made to certain sections of that Act which bear only upon the relations between the registered owner of a hackney carriage and the driver, and to the case of *Venables* v. *Smith* (1), which deals with the responsibility of the registered owner for the acts of the driver. In view of that discussion it is impossible to assume that the case was conducted on any other basis than that the defendant was the registered proprietor of the cab in question and as such liable for the acts of the driver, because on any other

(1) 2 Q. B. D. 279.

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assumption the reference to the Act and to that case would have been irrelevant. The county court judge made an offer to the plaintiff's counsel that if he would agree that the case should proceed on two questions only—namely, those of negligence and damages—then, in the event of the jury finding for the plaintiff on these questions, the question of the liability of the defendant should be reserved for further argument. The judge in making that offer was proposing to deprive the plaintiff of the opportunity of possibly eliciting from the defendant an admission and obtaining from the jury a finding that the relationship of master and servant in fact existed between the defendant and the driver altogether outside the Act of 1847. I am not surprised that the plaintiff's counsel refused to accept that. If the case had been tried out it might have been proved and found by the jury that the driver was in fact the paid servant of the defendant, and the difficulty of determining the question whether the defendant was liable under the Act would have disappeared.

The appeal also raises the question whether the county court judge was right in holding, as he appears to have held, that, although under the London Hackney Carriages Act, 1843, the registered proprietor of a hackney carriage is responsible for damage caused by the negligence of the licensed driver, yet the Town Police Clauses Act, 1847, which applies outside London, does not create the same artificial relationship of master and servant between the owner and the driver. In my opinion the learned judge was not right in so holding. For my part I think that, even in the absence of the Act of 1843, it would be impossible on the construction of the Act of 1847, ss. 45 to 68, to come to any other conclusion than that, where the registered proprietor of the cab allows it to be in the hands of a licensed driver, and damage is done by the negligence of the driver, the proprietor must be treated as the employer of the driver for the purpose of claims by members of the public in respect of the damage. The language of the sections seems to me to be conclusive. Sect. 46 provides that no person shall act as driver of any hackney carriage licensed in pursuance of the Act without first obtaining

a licence from the Commissioners. Sect. 47 provides that if any person acts as driver without having obtained a licence, or if the proprietor "employ" any person as driver who has not obtained a licence, the driver and proprietor shall respectively be liable to a penalty. Sect. 48 provides that in every case in which the proprietor "permits or employs" any licensed person to act as driver, the proprietor shall cause to be delivered to him and shall retain in his possession the licence of the driver while the latter remains in his "employ." Sect. 49 provides that "When any driver leaves the service of the proprietor by whom he is employed without having been guilty of any misconduct, such proprietor shall forthwith return to such driver the licence belonging to him; but if such driver have been guilty of any misconduct, the proprietor" shall proceed as therein mentioned. That section in speaking of "any driver" leaving the service of the proprietor plainly implies that every driver of a hackney carriage is in the service of the registered proprietor; and, therefore, the question whether the licensed driver of a modern taxicab which is a hackney carriage is the servant of the registered proprietor must be answered in the affirmative. Sect. 60 provides that no person authorized by the proprietor of any hackney carriage to act as driver shall suffer any other person to act as driver without the consent of the proprietor, and no person, whether licensed or not, shall act as driver without the consent of the proprietor, and any person so suffering another person to act, and any person so acting, without such consent, shall be liable to a penalty. That section treats the authorized driver as the agent of the proprietor for the purpose of appointing another person to act as driver with the consent of the proprietor. Sect. 63 provides that in every case in which any hurt or damage has been caused by the driver of any carriage let to hire, the justice before whom the driver has been convicted may direct that the proprietor shall pay a sum as compensation for the hurt or damage, and the proprietor may recover the same from the driver. How can it be said consistently with these sections that the Act

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does not create an artificial or statutable relationship of master and servant between the registered proprietor of a cab and the licensed driver? The sections speak in express terms of the driver as being in the service of, or as employed by, the registered proprietor.

We are not, however, left to rely upon our own unaided view regarding the construction of the Act of 1847. That Act followed after an interval of four years the London Hackney Carriages Act, 1843, and the provisions of the earlier Act are in substance identical with those of the later Act relating to hackney carriages. Under the earlier Act the Courts in a series of cases extending from *Powles* v. *Hider* (1) to *Keen* v. *Henry* (2) have uniformly held that, when damage has been caused by the act of the licensed driver of a hackney carriage, the registered proprietor is responsible and can be sued for the damage. The view taken was that the Act meant that for the protection of the public the registered proprietor was to be treated as if he were the master of the driver and, being so treated, that he should be held liable for the acts of the latter. In *Keen* v. *Henry* (2) the Court of Appeal after reviewing all the previous authorities again approved and adopted that view. That case further shows that although the driver may have another master, yet when he is a licensed driver he has also a master in the registered proprietor by virtue of the Act who is liable for his acts. In *Keen* v. *Henry* (2) Lord Esher M.R. pointed out that where the driver of a hackney carriage, who has a master in the ordinary sense of that word other than the registered proprietor, does an act which would give a person a right of action against his master, that person has a right of action against the registered proprietor, which does not interfere with the independent right of action which he has against the driver's master in the ordinary sense.

The Courts having interpreted the Act of 1843 as meaning that the driver of a hackney carriage is to be treated as the servant of the registered proprietor, it cannot consistently be said that a different conclusion should be arrived at as to

(1) 6 E. & B. 207. (2) [1894] 1 Q. B. 292.

the meaning of the similar provisions of the Act of 1847. Where a certain construction has been placed upon one Act, it follows that, in the absence of any reason to the contrary, the same construction must apply to a later Act passed in pari materia with the former. On the true construction of the Act of 1847, the licensed driver of a cab to which the Act applies must, therefore, be treated as if he were the servant of the registered proprietor, and a person who has been injured by the negligence of the driver may at his election sue either the driver's real master, or his statutable master, the registered proprietor of the cab.

The judgment of the county court judge must be set aside, and the case go back for a new trial.

SALTER J. I am of the same opinion. It is well settled that the London Hackney Carriages Act, 1843, establishes the relationship of master and servant between the registered proprietor of a hackney carriage and a licensed person whom he permits to act as its driver, making the former responsible for the acts of the latter when plying for hire; and in my view the Towns Police Clauses Act, 1847, establishes a similar relationship in the cases to which it applies. It is unnecessary in the present case to consider whether the registered proprietor of a cab would be liable under the Act for the acts of an unlicensed person to whom he or his licensed driver had improperly entrusted the cab. This case has been argued throughout on the footing that the defendant was the registered proprietor of the cab in question and that the driver was a licensed driver entrusted by him with its management.

Appeal allowed. New trial ordered.

Solicitors for plaintiff: *J. Nixon Watts & Co.*

Solicitor for defendant: *F. H. Carpenter, London and Brighton.*

J. R.

1923
April 27.

WHEAL REMFRY CHINA CLAY AND BRICK AND TILE COMPANY *v.* TRURO CORPORATION.

*Harbours—Obstruction to Navigation—Discharge of solid Matter into navigable River—*54 *Geo.* 3, *c.* 159, *s.* 11.

The appellants were the owners of china clay pits and works situate close to an unnavigable stream which after flowing some eleven miles terminated in a navigable river emptying into a harbour. There were no docks, dockyards, arsenals, wharves or moorings belonging to His Majesty in or near the navigable river or harbour. Refuse from the clay works was emptied by the appellants into the unnavigable stream, and was carried in due course into the navigable river:—

Held, that the appellants had emptied the refuse into the navigable river within the meaning of s. 11 of 54 Geo. 3, c. 159, and that the section applied although there were no docks, etc., belonging to His Majesty in or near the navigable river.

CASE stated by the justices of Pydar in the county of Cornwall.

On November 14, 1922, Joseph Bowden, the bailiff of the Truro Corporation acting as the harbour authority of the port or harbour of Truro (hereinafter called the respondents), preferred an information against the Wheal Remfry China Clay, Brick and Tile Company, Ld. (hereinafter called the appellants), charging that the appellants did on May 2 and 11, August 16, September 13 and 15 and October 2 and 3, 1922, and on divers other dates, at the parish of St. Enoder, then being the owners of certain china clay, etc., works worked by the appellants near a navigable river, cast, throw, empty or unlade, or cause or procure or permit to be cast, thrown, emptied or unladen certain gravel, earth, rubbish or filth, to wit mica or other waste products from their works into a place or situation on shore whereby the same was liable to be washed into the navigable portion of the River Fal within the said port of Truro by storms or land floods, contrary to s. 11 of 54 Geo. 3, c. 159. (1)

(1) 54 Geo. 3, c. 159, s. 11:—"If the owner, master or other person having the charge or command of any . . . . craft whatsoever, or any person working any quarry, mine or pit, near to the sea, or to any . . . . such harbour, haven or navigable river as aforesaid, or any other person or persons whatsoever, shall cast, throw, empty or unlade,

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Upon the hearing the following facts were admitted or proved. The appellants were the owners of china clay works worked by them close to the River Fal at Wheal Remfry, which is situate about three miles below the source and about seven miles in a straight line or about 11½ miles following the windings of the river, above Ruan Sett Bridge, the highest point of tidal ebb and flow in the river. At Wheal Remfry the river is about 10 feet wide and about 2 feet deep, and between that point and Ruan Sett Bridge there is a drop of 500 feet. There are no docks, dockyards, arsenals, wharves or moorings belonging to His Majesty (except an ancient quay, jetty or wharf at Mylor, twenty-two miles from Wheal Remfry) near the said works nor within the port of Truro. There is no shore at or near Wheal Remfry, but there are the banks of the said river and Wheal Remfry is adjacent thereto. The chief business of the appellants is that of excavating and purifying china clay. As this is associated with sand and mica it is commercially essential to separate these substances from the china clay by diluting the mass with water and allowing the mixture of sand, mica, china clay and water to flow first through sandpits and then through a series of filters known as "micas" where the mica together with a small quantity of china clay is deposited. Further processes leave a deposit of china clay, and it was admitted that certain rubbish or waste products, notwithstanding efforts by the appellants to retain them, were not retained in the appellants' tanks or trays, but found their way to the river and ran as far as the river goes. It was also admitted that these waste products flowed beyond Ruan Sett Bridge. Upon the said dates an effluent containing mica or other waste products in quantities was caused or

or cause or procure to be cast, thrown, emptied or unladen, either from or out of any such . . . . craft, or from the shore, any ballast, stone, slate, gravel, earth, rubbish, wreck or filth, into any of such ports . . . . harbours . . . . or navigable rivers . . . . as aforesaid, so as to tend to the injury or obstruction of the navigation thereof, or in any place or situation on shore where the same shall be liable to be washed into the sea, or into any such ports, ... harbours, ... or navigable rivers, either by ordinary or high tides or by storms or land floods; all and every such person and persons so offending" shall be liable to a penalty.

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permitted to be emptied by the appellants into the Fal at or near their said works. There was evidence that such mica or waste products were liable to be washed into the navigable portion of the river within the port and harbour of Truro by storms or land floods. Save as appears in para. (*b*) below it was not proved where the appellants stored any of the above substances.

The respondents contended: (*a*) That the appellants were at all material times persons working a mine, quarry or pit near to a navigable river, and (*b*) That the appellants had caused or procured to be cast, thrown, emptied or unladen gravel, earth, rubbish or filth, namely mica or other waste products, from their said works in a place or situation on shore where the same was liable to be washed into a river there situate into the navigable portion of the River Fal either by storms or land floods.

The justices convicted the appellants, but stated this case.

Schiller K.C. and *Moresby* for the appellants. The appellants were not guilty of an offence under s. 11 of 54 Geo. 3, c. 159. (1) In order to ascertain the meaning of that section reference must be made to the preceding sections which, by reference, refer back to s. 2. Sect. 2 deals entirely with harbours, etc., where His Majesty has moorings, docks, arsenals, etc., and the case finds that there are none such in the harbour of Truro. Sect. 11, therefore, does not apply.

The appellants are not working a quarry, mine or pit " near to the sea " within the meaning of the section. The wording of the section shows that what the Legislature intended to prevent was the throwing of rubbish into the harbour from ships, or from the shore or from a place on shore from which it could normally be thrown into the harbour. " From the shore " in the section is not the same thing as " from on shore." The case finds that there is no shore at Wheal Remfry. The section is also aimed at the throwing rubbish on any place on shore from whence it could be washed into the harbour or into a navigable river by storms or land floods.

(1) Ante, p. 594, note (1).

The Fal is not a navigable river at the point where this stuff entered it. No doubt the appellants may have put it into a conduit pipe which led it to the navigable river, but that is not dealt with by the section.

[*United Alkali Co.* v. *Simpson* (1) was referred to.]

Hawke K.C. and *Croom-Johnson* for the respondents were not called upon to argue. They referred to *Michell* v. *Brown*. (2)

LORD HEWART C.J. This is a case stated by justices in the county of Cornwall, and the question which it involves arises under s. 11 of 54 Geo. 3, c. 159. [His Lordship read the section (3) and stated shortly the facts.] Among the findings of fact are these: that it was admitted by the appellants' surveyor that whatever rubbish or waste product substances were not retained in the appellants' tanks and trays in their works found their way into the river and ran as far as the river went, and, moreover, that upon each of the material dates an effluent containing mica, or other waste products in quantities, was cast, or permitted to be emptied, by the appellants into the Fal at or near their works, and that there was evidence that such mica or other waste products were liable to be washed into the navigable portion of the said river within the port of Truro by storms and land floods. There has been some argument as to the true scope and meaning of s. 11 of this Act of George III. Apart from authority it would seem to be abundantly clear from the title of the Act and from the preamble that it distinguishes and does not confuse two separate things: one is the "better regulation of the several ports, harbours, roadsteads, sounds, channels, bays and navigable rivers, in the United Kingdom," and the other is "the better regulation . . . . of His Majesty's docks, dockyards, arsenals, wharves, moorings and stores therein." So far I have read from the title; and if one looks at the preamble one finds these words: "and that such further and other provisions

(1) [1894] 2 Q. B. 116. (2) (1858) 1 E. & E. 267.
(3) Ante, p. 594, note (1).

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should be made as hereinafter mentioned, for the better regulation and protection of the several ports, harbours, havens, roads, roadsteads, sounds, channels, creeks, bays and navigable rivers in the United Kingdom." But in fact the section has already been construed in *Michell* v. *Brown* (1), and, upon a different point, relevant however to the present controversy, in *United Alkali Co.* v. *Simpson.* (2) Having regard to the decisions in those two cases, and, indeed, to the plain meaning of the words, which, while they speak of "navigable rivers" in general, restrict the mischief against which the statute is directed to that which is likely to tend to the injury or obstruction of the navigation of the rivers, I think that the questions involved in this case stated become purely questions of fact, that there was evidence upon which the justices could decide as they did, and that this Court cannot, if it would, disturb those findings. I may add that it appears to me that these findings were right. I think that the justices rightly construed this Act and that, so construing, they were entitled upon the facts to come to the determination to which they came. It has been argued by Mr. Schiller for the appellants that the particular mode in which this emptying, or causing to be emptied, of rubbish took place is something which was not anticipated by the authors of this Act, which is now something like 110 years old. That may be. There are those who, even in legislation, build better than they know. But if it is clear what is the mischief that is aimed at, what is the kind of act which is being prohibited or made subject to penalty, then, if sufficiently general words are used, it matters not that the ingenuity of mankind invents in the course of time new modes of creating that mischief, when it comes, even by a process unknown at the time of the passing of the Act, within the clear words which are used.

I think, therefore, that this appeal ought to be dismissed.

SHEARMAN J. I am of the same opinion. The company that was convicted was formed to dig up china clay, which is purified by an elaborate process, and the result is that a lot

(1) 1 E. & E. 267. (2) [1894] 2 Q. B. 116.

of refuse containing solid matter is poured into a stream, and finds its way down to a navigable river. This has been found by the justices to tend to be an injury to navigation, in other words that it tends to silt up the harbour, and they, as I think, very properly convicted.

The argument mainly put before us was a historical one. I do not go into the details of it after the judgment of my Lord. It was that when this Act was passed it was a combination of different things, and it was not intended to do anything more than prevent people shooting rubbish out of ships or from the seashore. I have no doubt that there is this truth in it, that no one at that time thought of the silting up of harbours by solid matter brought down a river, neither did they contemplate, as we know, the digging of china clay. The digging of china clay in large quantities in Cornwall was quite unknown at that time, though I do not forget that this Act is not confined to Cornwall. But the Legislature did not contemplate at that time elaborate scientific processes, china clay works, sewage works and matters of that kind, in consequence of which solid matter might flow out with the harmless water effluent, and that solid matter might thus flow into rivers. But we have not to consider whether they were thinking of these things when they framed the Act. What we have to consider is: does the act for which the summons is issued come within the plain terms of the section? It seems to me—and I have been guided a good deal by the case of the *United Alkali Co.* v. *Simpson* (1)—that the appellants did cause to be cast, thrown or emptied into this navigable river, the stuff being washed down by the non-navigable river, earth or rubbish, and I think that this, with the other facts as found by the justices, comes clearly within the first part of the section.

BRANSON J. I agree. Mr. Schiller's first point was that s. 11 of this statute applied only to harbours and navigable rivers in or near which are docks, dockyards or moorings belonging to His Majesty. That point, it seems to me, has

(1) [1894] 2 Q. B. 116.

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been decided against him in the case of *Michell* v. *Brown*. (1) His second point was that upon the facts that were found or admitted there was no evidence to show that the appellants had put anything into this navigable river or harbour. The facts of the case established clearly that they put into tanks and trays upon their works the material which ultimately got into the river and tended to do the mischief. His contention was that because it found its way into the river through the unnavigable upper reaches of it and not directly into the navigable part of the river, the case did not come within the section. It seems to me that that part of his argument is shown to be wrong by the decision in the case of the *United Alkali Co.* v. *Simpson*. (2) I think that if authority is needed to show that a man who puts into the upper reaches of a navigable river substances of such a nature that he must know they will be carried down to the navigable reaches and there become deposited, does himself put the substances into the river within the meaning of the section, it is to be found in that case.

For these reasons I agree with the judgment which my Lord has pronounced.

Appeal dismissed.

Solicitors for appellants: *Robbins, Olivey & Lake, for Nalder & Son, Truro.*

Solicitors for respondents: *Whatley & Son for F. Parkin, Town Clerk, Truro.*

(1) 1 E. & E. 267.

(2) [1894] 2 Q. B. 116.

W. L. L. B.

JACKSON *v.* ANGLO-AMERICAN OIL COMPANY, LIMITED.

1923
May 2.

Costs—Successful Defendant—Right to Costs—Discretion of County Court Judge.

A collision having taken place between the plaintiff's motor car and the defendants' motor lorry, the plaintiff brought an action in the county court against the defendants, alleging that the collision and consequent damage to his car had been caused by the negligence of the defendants. The defendants pleaded that there had been no negligence on their part, and alternatively that there had been contributory negligence on the part of the plaintiff. At the trial it was found that in fact both sides were to blame for the collision. The county court judge gave judgment for the defendants, but directed that there should be no costs:—

Held, on appeal, that the decision of the judge, in so far as it deprived the defendants of their costs of the action, was wrong, and that the defendants were entitled to these costs, inasmuch as they had been wholly successful in the action, and the case did not come within any of the exceptional classes in which the judge in the exercise of his discretion can deprive a successful defendant of costs.

Ritter v. *Godfrey* [1920] 2 K. B. 47 explained and applied.

What constitutes a separate "issue" in an action discussed and explained.

Appeal from Bath County Court.

The plaintiff, T. L. Jackson, brought the action in the county court against the defendants, the Anglo-American Oil Company, Ld., for damage to his motor car by the alleged negligence of the defendants' servant.

The plaintiff alleged in his particulars of claim that on September 5, 1922, a motor lorry, the property of the defendants, was being driven by a servant of theirs in Ray Mill Lane from the direction of Lacock, Wilts, and by reason of the negligence of the defendants' said servant in the driving and management thereof the said lorry collided with and damaged the plaintiff's motor car which was being driven along the said lane towards Lacock by the plaintiff's wife, whereby the plaintiff had been put to expense in repairing the car, and had lost the use of it, and had thereby suffered damage.

On February 15, 1923, the action was tried in the county

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court, when the judge held that both sides were to blame, inasmuch as either side with reasonable care might have avoided the accident, and gave judgment for the defendants, but directed that there should be no costs.

The defendants appealed against the decision of the county court judge in so far as it directed that they should have no costs on the grounds (1.) that the defendants were successful in the action, and the refusal of the judge to make an order for costs was wrong in law, (2.) that the judge failed properly to exercise his discretion as to costs in the action, and (3.) that there was no evidence that the defendants had done any wrongful act or been guilty of any omission, and that there was no other or any ground which could found a legal reason for depriving the defendants of their costs of defence in the action.

Craig Henderson K.C. (*D. K. Walters* with him) for the defendants, appellants. The order of the county court judge depriving the defendants of their costs of the action was wrong and should be set aside. The sole issue in the action was whether or not there was negligence on the part of the defendants which was the cause of the accident. The plaintiff in order to make out his case had to establish the affirmative of that issue. He no doubt obtained a finding that there was negligence on the part of the defendants, but he failed to show that that negligence was the cause of the accident, inasmuch as the judge found that there was also negligence on the part of the plaintiff which caused the accident. The defendants were therefore wholly successful in the action: see *Cooper* v. *Howatt*. (1) It follows that the judge was bound to give the defendants their costs of the action, unless in the exercise of his discretion he could deprive them of costs on one or other of the three grounds mentioned in *Ritter* v. *Godfrey*. (2) There was no evidence to show that any of these grounds existed in the present case.

H. C. Wethered for the plaintiff. The order of the county court judge depriving the defendants of their costs was

(1) (1922) 38 Times L. R. 721. (2) [1920] 2 K. B. 47.

right and should not be interfered with. The plaintiff alleged that negligence on the part of the defendants was the cause of the accident. The defendants alleged in defence that there was no negligence on their part which caused the accident, and further that there was contributory negligence on the part of the plaintiff which caused the accident. There were thus two separate issues in the case: first, was there negligence on the part of the defendants; and, secondly, was there contributory negligence on the part of the plaintiff? The defendants obtained a finding in their favour on the second of these issues, but they failed to obtain a finding on the first issue as to their own negligence. Thus, the defendants were not wholly successful in the action. The case of *Ritter* v. *Godfrey* (1) has therefore no application, for that case only decides that it is where a defendant is wholly successful that the discretion of the judge to disallow him costs is limited to the three particular grounds there mentioned. Under the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 113, the county court judge has full discretion in regard to the costs of the action, subject to the established rules regulating the exercise of that discretion. Here the judge found that both sides were to blame, and that being so there was no rule of law which prevented him from exercising his discretion by directing that neither side should have costs. In Admiralty cases where both ships are found to blame for a collision the rule is that neither side shall have costs. The present case is analogous to these cases, and the same rule ought therefore to be applied to it.

LUSH J. I am reluctant to interfere with the discretion which the learned county court judge has exercised in making the order as to costs which is the subject of this appeal. Principles have, however, been laid down by the Court of Appeal for the guidance of a judge in exercising his discretion as to costs in a case of this kind, and if these principles have not been applied by the judge in this instance, we have no alternative but to set aside his order. The only question

(1) [1920] 2 K. B. 47.

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which we have to consider is whether or not the judge applied the accepted principles regulating the exercise of his discretion as to costs. The plaintiff brought the action against the defendants for alleged damage to his motor car in a collision with the defendants' motor lorry, which took place on a country road in Wiltshire at a point where there was a curve in the road. In order to succeed in the action the essential fact which the plaintiff had to prove was that negligence on the part of the defendants was the cause of the collision. At the trial one of the facts found by the county court judge was that the plaintiff's own car was driven so carelessly and at such a speed round the curve in the road as to cause it to collide with the defendants' lorry. In view of that fact the plaintiff could not have succeeded in the action whether the driver of the defendants' lorry was negligent or not. On the facts found by the judge the plaintiff was bringing an action which must necessarily have failed. He had, in short, no cause of action against the defendants. The county court judge gave judgment for the defendants; but because he found both sides to blame he made an order that there should be no costs and thus deprived the successful defendants of their costs. In so exercising his discretion as to costs I think that the learned judge applied a wrong principle. Even apart from authority it would, I think, be surprising to find that, when a plaintiff brings an action which, as the event shows, he ought to have known that he had no right to bring, and accordingly fails, the defendant should have to pay the costs incurred by him in resisting a claim which should never have been made against him. The matter has, however, been authoritatively dealt with in several cases. In *Ritter* v. *Godfrey* (1) the Court of Appeal, after going carefully through the previous cases relating to the subject, laid down the principles that ought to guide a judge in depriving a successful defendant of costs. The Court of Appeal there held that the judge could not deprive a successful defendant of his costs except on one or other of three grounds. These grounds were very clearly enunciated by Atkin L.J.

(1) [1920] 2 K. B. 47.

The first two relate to the defendants' responsibility for the litigation, and as they have no application to the present case it is not necessary now to consider them. The Lord Justice, however, added a third ground, which is stated in the headnote to the report of the case to be that the defendant "had done some wrongful act in the course of the transaction of which the plaintiff complains." That headnote is perhaps not quite accurate, inasmuch as it would suggest that any wrongful act done by the defendant in the course of the transaction complained of would be a ground for depriving him of costs. The Lord Justice explains what is meant in the course of his judgment, where, after observing that ground (2.) would include improper conduct in or connected with the litigation calculated to defeat or delay justice, he goes on to say: "Such conduct would also be included in (3.), which, I think, further extends to cases where the facts complained of, though they do not give the plaintiff a cause of action, disclose a wrong to the public . . . . , by which I understand some criminal or quasi-criminal misconduct, e.g., a fraud or crime or preparation for a fraud or crime, or possibly some act of serious oppression. Such conduct must, however, be in the course of the transaction complained of." (1) That is what the Lord Justice referred to when he spoke of conduct outside the litigation which might deprive the successful defendant of costs. He did not mean that any wrongful act in the course of the transaction would be sufficient for that purpose. In the present case there has been no wrong to the public or conduct of that kind to bring the case within the third of the heads mentioned by the Court of Appeal. The defendants having been successful and the case not being one of the exceptional cases in which the defendant may be deprived of costs, it follows that the defendants are entitled to their costs, and that consideration disposes of the case.

If there had been a separate issue in the case on which the defendants failed, the county court judge could, no

(1) [1920] 2 K. B. 47, 61.

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doubt, have ordered them to pay the costs of that issue, and to set these costs off against those of the issues on which they had succeeded. I do not say whether in such a case the judge could order each party to pay their own costs. In this case, however, there were not separate issues. Where, as here, a plaintiff brings an action for damage caused by the alleged negligence of the defendant, and the defendant sets up as a defence contributory negligence on the part of the plaintiff, the questions of negligence and contributory negligence are not separate issues in the action. That clearly follows from the cases of *Howell* v. *Dering* (1) and *Quirk* v. *Thomas*. (2) In the latter case it was stated that "an 'issue' in this connection meant an allegation of fact which, unless displaced, would establish a liability." In the present case the allegation of negligence in the defendants, though not displaced, did not establish a liability on their part towards the plaintiff, because it was also found that the accident was due to negligence on the part of the plaintiff. That allegation of negligence was not a separate issue, inasmuch as it did not establish any liability on the part of the defendants unless it was the cause of the accident. There was only one issue in the case—namely, was there negligence on the part of the defendants which was the cause of the accident? Apart from that there was no separate issue. On that issue the defendants were wholly successful, and the learned county court judge had no right to deprive them of their costs.

In my opinion this appeal must be allowed with costs.

SALTER J. I am of the same opinion. If the defendant was wholly successful, I think the matter is concluded by authority. Mr. Wethered for the plaintiff so admits, but he says the defendant was not wholly successful. The question, therefore, is, Was there any issue on which the plaintiff could succeed? I will assume that there were pleadings in the form most favourable to Mr. Wethered's

(1) [1915] 1 K. B. 54.
(2) [1915] W. N. 147; affirmed [1916] 1 K. B. 516, 535.

contention. In such a case the plaintiff alleges there was negligence on the part of the defendant which caused the injury. To that allegation there are three ways in which the defendant might plead. First, he might admit that there was negligence on his part, and further, that his negligence was a cause, or partly the cause, of the plaintiff's injury, but he might deny that his negligence was the sole or the real cause of the plaintiff's injury, inasmuch as there was contributory negligence on the part of the plaintiff. Secondly, he might admit that there was negligence on his part, but he might deny that his negligence was in any way the cause of the plaintiff's injury, and, in the alternative, assuming that there was negligence on his part, he might deny that it was the sole or real cause of the injury, inasmuch as there was contributory negligence on the part of the plaintiff. Thirdly, making no admission, he might deny that there was any negligence on his part, and, in the alternative, assuming that there was negligence on his part, he might deny that that negligence caused the injury, and, in the further alternative, he might deny that his negligence was the sole cause of the injury, inasmuch as there was contributory negligence on the part of the plaintiff. In the first of these forms of pleading contributory negligence would be the only question raised; in the second form it would be pleaded as the first alternative; and in the third form it would be pleaded as the second alternative. I will assume in the plaintiff's favour that here the defendants are to be taken to have adopted the third of these forms of pleading and to have denied everything. In my opinion even in that case there was no issue on which the plaintiff succeeded and on which costs could be given to him. I think that there was here only one issue—that is to say, that the plaintiff alleged, and the defendant denied, that there was negligence on the part of the defendant which caused the plaintiff's injury.

The question raised in this appeal is one of great practical importance. It certainly sounds not unreasonable when first stated that a judge who thinks that both parties were to blame

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in a case of this nature should have power to order each party to pay his own costs, but according to the authorities I think he had no power to make such an order.

Appeal allowed.

Solicitors for appellants: *Stanley & Co.*

Solicitors for respondent: *Dyne, Müller & Hughes, Bruton, Somerset.*

J. R.

1923
May 4.

CALCRAFT AND ANOTHER *v.* LONDON GENERAL OMNIBUS COMPANY, LIMITED.

Jury—Trial by—Right of Party to—Refusal of—Discretion of County Court Judge—Administration of Justice Act, 1920 (10 & 11 *Geo.* 5, *c.* 81), *s.* 3, *sub-s.* 1.

The Administration of Justice Act, 1920, s. 3, sub-s. 1, provides that: "Where, in any action or other matter whatsoever requiring to be tried in a county court . . . . , the court or a judge is satisfied, on an application made by either party to the proceedings . . . . , that the action or matter cannot as conveniently be tried with a jury as without a jury, the court or a judge shall . . . . have power . . . . to order the trial of the action or matter without a jury":—

Held, that it is not a sufficient ground for the exercise by a county court judge of the power conferred upon him by this sub-section of ordering the trial of an action without a jury, that the cause list in the Court is so congested that if the action were tried with a jury the trial of that action and of other actions would thereby be postponed or delayed.

APPEAL from Westminster County Court.

In November, 1922, the plaintiffs, Caroline Calcraft, an infant, and Charles Calcraft, her father and next friend, brought an action in the High Court [1922 C. No. 5106] against the defendants, the London General Omnibus Company, Ld., for damages for alleged negligence.

In December, 1922, an order was made by a Master remitting the action for trial in the Westminster County Court.

The plaintiffs delivered particulars of claim in which they

alleged that on October 29, 1921, in Falcon Road, Battersea, London, S.W., the defendants' servant so negligently drove and managed one of their motor omnibuses that it knocked down and personally injured the infant plaintiff, and that the adult plaintiff thereby incurred expense.

The plaintiffs desired that the action should be tried with a jury and asked that it should be set down to be so tried.

The defendants gave notice, dated March 2, 1923, of an application to the county court for an order that the trial should take place with a judge alone.

In two other remitted actions by different plaintiffs against the same defendants similar applications were made, and the three applications came before the county court judge together. The application in one of the other actions (*Marshall* v. *London General Omnibus Co., Ld.*) was heard first, and during the discussion which took place on the hearing of that application, the judge said that the work in his Court was very heavy, his Court being one of the hardest worked Courts in the country, that there were many actions in front of the action in question, and that it would in any case be long before it was reached, that it seemed to him that he was bound by the observations of Scrutton L.J. in *Ford* v. *Blurton* (1); that the High Court was always ready to grant a jury because there was not so much work there as in his (his Honour's) Court, that it was a serious matter for the jury, for counsel, and for other persons concerned to come to the Court and find that the case lasted for a long time; but since in *Marshall's Case* in the High Court the Master (as was then supposed) had directed that the case should be tried before a judge and jury, his Honour made an order that it should be so tried. On the hearing of the application in the present case (*Calcraft's Case*) the county court judge observed that it was the interest of the public that had to be considered, and that that case was different from the last as the Master had given no direction, and he ordered that that case should be tried by a judge alone, and on being asked upon what

(1) (1922) 38 Times L. R. 801.

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grounds he made the order he replied that he did so in the exercise of his own discretion.

The plaintiffs appealed.

Sylvain Mayer K.C. (*C. T. Williams* with him) for the plaintiffs, appellants. The order of the county court judge directing that the action should be tried by a judge without a jury was wrong and should be set aside.

In the county court, as in the High Court, the law relating to trial by jury has been altered from time to time. Under the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 101, in all actions where the amount claimed exceeded 5*l.* either party had a right to require a jury unless the action was of the nature of those assigned to the Chancery Division of the High Court. During the war the right to trial by jury was to a large extent suspended by the Juries Act, 1918 (8 & 9 Geo. 5, c. 23), s. 3 of which related to trials in the county court. After the war that Act was repealed by the Administration of Justice Act, 1920, which restored the right to trial by jury and placed it upon its present footing. Sect. 3 of that Act relates to trials in the county court, and that section has not been limited or modified by any rule of Court. Sub-s. 1 (1) of that section provides that where a judge is satisfied on an application by either party that the action cannot as conveniently be tried with a jury as without a jury, he shall have power to order the trial of the action without a jury. Under that sub-section the judge can only make such an order where he is satisfied that the action cannot as conveniently be tried with a jury as without a jury. While the sub-section no doubt gives the judge a discretion, it is a discretion which must be exercised judicially and not

(1) The Administration of Justice Act, 1920, s. 3, provides: "(1.) Where, in any action or other matter whatsoever requiring to be tried in a county court or any other inferior court of civil jurisdiction, the court or a judge is satisfied, on an application made by either party to the proceedings in accordance with rules of Court, that the action or matter cannot as conveniently be tried with a jury as without a jury, the court or a judge shall . . . . have power . . . . to order the trial of the action or matter without a jury."

arbitrarily: see *Brown* v. *Dean* (1); and *Ford* v. *Blurton* (2), where the observations of Scrutton L.J. (3) are not inconsistent with those of the other Lords Justices. In exercising his discretion under the sub-section the judge must have regard to the convenience of the parties to the particular action only, and not to that of parties to other actions or of persons otherwise concerned in the business of the Court. In the present case and in the other cases with which he dealt at the same time the county court judge did not exercise his discretion judicially. He had regard to the fact that, if the particular action were tried with a jury, the trial of other actions and the business of the Court generally might be delayed. He also allowed himself to be influenced by what he supposed to have been the view taken by the Master in the High Court as to whether the action should be tried with a jury. The sub-section throws the burden upon the party making the application of satisfying the judge that the action cannot as conveniently be tried with a jury as without a jury; and here the defendants did not discharge that burden. The county court judge wrongly assumed that the burden was on the plaintiffs who desired a jury.

R. O. Roberts for the defendants, respondents. The order appealed from was right and should not be interfered with.

Sect. 3, sub-s. 1, of the Act of 1920 (4) leaves it to the discretion of the county court judge to make or not to make an order for the trial of an action without a jury according as he is or is not satisfied that the action cannot as conveniently be tried with a jury as without a jury. Under that sub-section, as under the corresponding provision of s. 2 relating to trials in the High Court, a judge is entitled in the exercise of his discretion to consider the interests of the parties to the particular action, the interests of the Court and jury whose time is occupied, and the general interests of the administration of justice: see per Scrutton L.J. in *Ford* v. *Blurton*. (4) In the present case the county court

(1) [1910] A. C. 373; affirming [1909] 2 K. B. 573.
(2) 38 Times L. R. 801.
(3) Ibid. 804.
(4) See note (1) ante, p. 610.

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judge rightly exercised the discretion conferred upon him by the sub-section. At the time when the application in question was made the cause lists in Westminster County Court were in a very congested state, and if an order had been made for the trial of this action with a jury the trial of this action and of subsequent actions would have been delayed, and the interests of the parties, of the Court and jury, and of the public would have been prejudiced. Having regard to these considerations, the county court judge rightly made the order in question directing that the action should be tried by a judge alone.

LUSH J. In my opinion there was no ground whatever upon which the county court judge could deprive the plaintiffs of their right to have the action tried with a jury. I desire to repeat what was said in *Ford* v. *Blurton* (1) by Bankes and Atkin, L.JJ., when speaking of the importance of trial by jury in the administration of justice. Bankes L.J. said: "I trust . . . . that the other aspect of the case may also be considered, namely, whether the right to a trial by jury is not sufficiently important to be restored and maintained, subject always to exceptions which should be precisely indicated. The standard of much that is valuable in the life of the community has been set by juries in civil cases. They have proved themselves in the past to be a great safeguard against many forms of wrongs and oppression. They are essentially a good tribunal to decide cases in which there is hard swearing on either side, or a direct conflict of evidence on matters of fact, or in which the amount of damage is at large and has to be assessed." (2) Atkin L.J. expressed the same view in these words: "Trial by jury, except in the very limited classes of cases assigned to the Chancery Court, is an essential principle of our law. It has been the bulwark of liberty, the shield of the poor from the oppression of the rich and powerful. Any one who knows the history of our law knows that many of the liberties of the subject were originally established and are maintained by the verdicts of

(1) 38 Times L. R. 801, 804. (2) Ibid. 803.

juries in civil cases." (1) The safeguarding of the right to trial by jury is an extremely important part of the administration of justice. The county court judge in making the order which he made in this case ignored the importance of the principle involved and did not appreciate the gravity of the order which he was making. The right to trial by jury was suspended during the war, but it was restored by the Administration of Justice Act, 1920, in suitable cases. Sect. 2 of that Act relates to trials in the High Court, and s. 3 to trials in the county court. It is here only necessary to consider s. 3, sub-s. 1. (2) [His Lordship read that subsection except the provisos thereto.] That provision is perfectly explicit in its language, and, unlike the corresponding part of s. 2, it has not been modified by any rule of Court, and I doubt whether it could be so modified. It puts the onus upon the party who desires to dispense with a jury, and unless he discharges that onus the county court judge has no other course open to him than to allow the action to be tried with a jury. The judge was bound to have regard to that provision, and to consider what duty it imposed upon him. He ought to have asked himself whether it had been established to his satisfaction that the action could not as conveniently be tried with a jury as without a jury. So far as I can see, during the discussion which took place in the county court the judge never applied his mind to the matter in question. From one of the observations which he made it would seem that he thought that it was entirely for him to say whether he preferred that the case should be tried with or without a jury. The sub-section, however, does not give him an unlimited discretion, but a judicial discretion to be exercised on proper material.

The Court has now to ask itself the question which the county court judge should have asked himself—namely, whether the circumstances here were such that the judge might properly be satisfied that the action could not as conveniently be tried with a jury as without a jury. Was there any material here on which an order could be made

(1) 38 Times L. R. 805. (2) See note (1) ante, p. 610.

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dispensing with a jury? The ground of the judge's decision would seem to have been that the cause lists in his Court happened to be very much congested, and that if an order was made for the trial of this case with a jury the trial of this particular case and of other cases also would be postponed. If that was the ground of his decision I do not think it was a good ground. In my opinion the sub-section does not mean that the judge shall be entitled on such a ground as that to order the trial of an action without a jury. It is said that that is what Scrutton L.J. meant in *Ford* v. *Blurton* (1) when he said: "In my view the words [of s. 2, sub-s. 1] entitle the judge to consider the method of trial best suited effectively and speedily to dispose of the issues in the case, considering the interests of the parties, of the Court and jury whose time is occupied, and the general interests of the administration of justice." I do not think that the Lord Justice in making that statement meant that the mere fact that the cause lists of the Court were congested was a sufficient reason for depriving a litigant of one of the most valuable constitutional rights that he possesses. He was referring to entirely different considerations. Under the former practice in the High Court (2) there was a rule empowering the judge in certain cases, if it appeared desirable, to direct the trial without a jury of a question or issue arising in a cause. Under that rule could a Master have justified an order for the trial of a question without a jury because the cause lists in the High Court were becoming congested? Could he in effect have suspended the right of litigants to trial by jury on that ground? It is clear that he would have had no such power. The county court judge equally had no such power, yet that is the power which in this instance he has purported to exercise. He has not treated this action as an isolated action in which having regard to its particular circumstances he thought in his discretion that he should try it without a jury. He has laid down a principle which would justify him in making a similar

(1) 38 Times L. R. 801.

(2) See Rules of the Supreme Court, 1883, O. XXXVI., r. 4.

order in every case which came before him, and thus in effecting at any time a suspension of the right to trial by jury in his Court. In doing this the county court judge was acting entirely without jurisdiction. If he had a discretion in the matter, it was a judicial discretion and he has not exercised it judicially. However expedient it may have been for the judge to consider the relief of the lists in his Court, he should not have had regard to that consideration when dealing with the defendant's application.

In my opinion the order appealed from should be set aside, and the action should be tried by a judge and jury.

SALTER J. I agree. I think the order made by the county court judge was wrongly arrived at on two grounds.

In the first place I think that the onus was upon the defendants of showing that the action should be tried without a jury, and not upon the plaintiffs of showing that it should be tried with a jury. The right to trial by jury in the county court is now regulated entirely by the Administration of Justice Act, 1920, s. 3. The plaintiffs had set down this action for trial with a jury, and under s. 3, sub-s. 1, they had a right to a trial with a jury unless the defendants could satisfy the county court judge that the action could not as conveniently be tried with a jury as without a jury. I have considered the note that was made of the discussion which took place on the hearing of the defendants' application for a trial without a jury, and I am satisfied that the county court judge instead of recognizing that the onus of proof was upon the defendants dealt with the matter as if the onus was upon the plaintiffs.

Secondly, I do not think that the circumstances were such that under s. 3, sub-s. 1, the county court judge should have been satisfied that the action could not as conveniently be tried with a jury as without a jury. I have no intention of attempting to lay down a hard and fast rule regarding the matters which may properly be considered by the county court judge in exercising his jurisdiction under that sub-section. I may say, however, that in my opinion he ought

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to have regard only to the interests of the parties to the particular litigation and the proper trial of that litigation. If the trial of the action with a jury would delay or otherwise interfere with the trial of that particular action, that may or may not be a ground upon which the judge in the exercise of his discretion should order the trial of the action without a jury. In the present instance, however, the only reason why the judge made an order that the action should be tried without a jury was that there was a press of business in his Court. He made the order not only for the convenience of the plaintiffs or defendants in the action, but for the convenience of suitors in other cases also. If that was a ground on which the judge could properly exercise his discretion, the result would be that trial by jury would be obtainable in Courts which were not busy but not in Courts which were busy, and that it would be obtainable in a Court at a time of the year when it was not busy, but not at a time of the year when it was busy. Moreover, the judge would have power to suspend the right to trial by jury in his Court at any time when the cause list happened to become congested. In my opinion there was here no ground on which the county court judge was justified in ordering the action to be tried without a jury, and it ought therefore to be tried with a jury.

Appeal allowed.

Solicitors for plaintiffs: *Berry, Tompkins & Co.*
Solicitors for defendants: *Joynson-Hicks & Co.*

J. R.

COLLINS *v.* HOPKINS.

1923
June 5, 6, 20.

Landlord and Tenant—Furnished House—Implied Warranty—Reasonable Fitness for Habitation—Substantial Risk of Infection—Right of Tenant to repudiate Tenancy.

Upon the letting of a furnished house there is an implied warranty in the nature of a condition that the demised premises shall be reasonably fit for habitation at the date fixed for the commencement of the tenancy. A house in which a person has recently been suffering from pulmonary tuberculosis does not comply with such warranty, and the tenant is therefore entitled to repudiate the contract of tenancy on the ground that the premises are not reasonably safe for human occupation.

ACTION tried before McCardie J.

The following statement of facts is taken from the judgment of the learned judge.

By an agreement dated October 14, 1922, the defendant, Mrs. Hopkins, let to the plaintiff, Mr. Collins, a furnished house known as The Poplars, St. Albans, for twenty-six weeks at 6½ guineas a week. The tenancy was to begin on October 26, 1922. On that day the plaintiff entered into residence with his wife, his daughter, aged fifteen, and his domestic maids. He had previously paid 88*l.* for the first thirteen weeks. On October 27 (the day after he entered) he discovered that the defendant's husband, while suffering from pulmonary consumption, had recently resided in the house, and was then in Switzerland under treatment for that complaint. The plaintiff at once repudiated the agreement of tenancy and quitted the house on the ground that it was not reasonably fit for habitation, and that the defendant had therefore broken her implied warranty. He now claims damages, including the 88*l.* he had paid. As a further ground of claim he relies upon an express verbal warranty asserted to have been made by the defendant's agents (a firm of surveyors) that the defendant's husband was not suffering from consumption.

The evidence relating to the alleged express warranty is stated in the judgment of McCardie J.

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Barrington-Ward K.C. and *W. Blake Odgers* for the plaintiff.

Thorn Drury K.C. and *P. B. Morle* for the defendant.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

June 20. McCARDIE J. read the following judgment: This action is important alike to the parties and to the public. [His Lordship stated the facts and continued:] I will postpone the question of express warranty until I have considered the implied warranty and the breach alleged. Much evidence was given before me. Several questions of fact require decision. It will be convenient, however, to set out briefly the rules of law which I deem applicable. I shall then be able to indicate my view as to the relation between the facts found and the relevant law.

In the case of an unfurnished house there is ordinarily no warranty of fitness for occupation. Special circumstances may create such a warranty, and with respect to working-class houses particular provision is made by statute. Normally, however, no warranty exists. It is important, however, to point out that in *Bunn* v. *Harrison* (1) the Court of Appeal expressly left open the question whether there is an implied warranty of fitness in the case of an unfurnished house if it be let for immediate occupation. The rule is different with respect to furnished houses or apartments. In such a case the law implies, in the absence of agreement to the contrary, a warranty by the landlord as to the state and fitness of the premises. What is the nature and extent of that warranty? Different phrases have been used in different judgments. In *Smith* v. *Marrable* (2) the defendant had repudiated the tenancy of a furnished house on the ground that it was infested with insects. The Court held that he was justified in so doing. Parke B. referred to the implied condition that a furnished house is in a state fit for "decent and comfortable habitation." Lord Abinger C.B. said "a man

(1) (1886) 3 Times L. R. 146. (2) (1843) 11 M. & W. 5, 7, 9.

who lets a ready-furnished house surely does so under the implied condition or obligation—call it which you will—that the house is in a fit state to be inhabited. Suppose, instead of the particular nuisance which existed in this case, the tenant discovered the fact—unknown perhaps to the landlord—that lodgers had previously quitted the house in consequence of having ascertained that a person had recently died in it of plague or scarlet fever; would not the law imply that he ought not to be compelled to stay in it? I entertain no doubt whatever on the subject, and think the defendant was fully justified in leaving these premises as he did." The learned Chief Baron obviously took a strong view as to the extent of the warranty. In *Wilson* v. *Finch Hatton* (1) (a case of defective drainage) Kelly C.B. referred to "an implied condition that the house is reasonably fit for habitation, so that the intending tenant can safely enter into his tenancy on the day on which that tenancy begins." Later he said: "Is it not, then, clear that the tenant is entitled to find the drains in such a condition that she and her family and servants can safely enter and live in the house?" Huddleston B. said: "I think it is clear that there is in such a contract as this an implied condition that the furnished house agreed to be let and taken shall be reasonably and decently fit for occupation." In *Bird* v. *Lord Greville* (2) the furnished house was taken by the tenant on and from March 28, 1889. The tenant heard, a few days before March 28, that a child had been suffering from measles in the house and in fact a child had so suffered from March 10 to March 19, when it was removed. Field J., who tried the case, asked this question: "Was the house in a good and tenantable condition and reasonably fit for human occupation from the very day on which the tenancy is dated to begin?" Although it was proved that certain steps had been taken to disinfect the premises yet the learned judge held that the tenant was entitled to repudiate because (1.) the best disinfecting processes had not been used, and (2.) that the house was not free

(1) (1877) 2 Ex. D. 336, 340, 345. (2) (1884) Cab. & El. 317.

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from infection on March 28. In *Charsley* v. *Jones* (1) (a case of defective drains) Manisty J. said that in the case of a furnished house there was an implied undertaking that the house was fit for human habitation. In *Sarson* v. *Roberts* (2) the Court of Appeal held, for reasons which they deemed adequate, that the warranty is confined to the state of the premises when the tenant enters and that there is no implied warranty that they shall continue fit for habitation during the term. I need not discuss the judgments. They throw no fresh light on the point here at issue. The observation of Kay L.J. that the rule of law "is extremely artificial" is one to which I am unable to assent. I venture to say with all respect that the contrary is the case. Not only is the implied warranty on the letting of a furnished house one which, in my own view, springs by just and necessary implication from the contract, but it is a warranty which tends in the most striking fashion to the public good and the preservation of public health. It is a warranty to be extended rather than restricted. Here I feel bound with deep respect to observe of *Humphreys* v. *Miller* (3) (a decision which deals with a converse case to the present) that I venture to hope that it will be considered by the highest appellate tribunal. There it was held by the Court that there is no implied warranty on the taking of furnished lodgings that the intending tenant is a fit and proper person to occupy them and that he is not suffering from an infectious disease. The decision is one which in my humble view is opposed alike to sound policy and to legal principle. I make no further comment on it nor need I point out the consequences it involves now. I only say that if the common law cannot be developed it will perish. The result of the decisions as a whole seems to be that there is an absolute contractual warranty in the nature of a condition by the person who lets a furnished house or lodging to the effect that the premises and furniture are fit for habitation. What is the meaning of "fit for habitation"? The meaning of the phrase must vary with the circumstances

(1) (1889) 5 Times L. R. 412. (2) [1895] 2 Q. B. 395.
(3) [1917] 2 K. B. 122.

to which it is applied. In the case of unclean furniture or defective drains or a nuisance by vermin the matter is not, as a rule, one of difficulty. The eye or the nostrils can detect the fault and measure its extent. But in the case of a house lately occupied by a person suffering from an infectious disease, the eye and other senses are of no avail. The bacilli of infection are not apparent to the eye. Yet a peril is none the less grave because it is hidden.

This case before me definitely raises the question as to the contractual duty of a person who lets a furnished house lately occupied by one suffering from an infectious disease. It is not, of course, enough for the landlord to say that he honestly believes that the house is fit and proper for safe habitation. It must in fact be fit and safe. The mere belief of the landlord is not the point. Nor, on the other hand, can a tenant renounce his contract because of mere apprehension of risk or through mere dislike to the premises through the fact, e.g., that a person has died upon the premises of smallpox or scarlet fever. He must show more than mere apprehension or dislike. In my view the question in such a case as the present is this: Was there an actual and appreciable risk to the tenant, his family or household, by entering and occupying the house in which the infectious disorder had occurred? If the risk be serious, no one, I think, could doubt that the tenant may renounce. But in dealing with bacilli which may mean illness and death, I think further that an appreciable measure of actual risk justifies the tenant in throwing up his contract. A man should not be called on to expose his wife and children, household or himself to peril.

Amongst the matters to be considered are the nature of the disease; the degree and persistence of its infectivity; the date when the sufferer resided in the house; the steps taken to prevent risk of infection and the like. Let me illustrate the matter further by taking a case where the landlord says to an incoming tenant of a furnished house: "I admit that my child died in the house but a short time ago of a contagious disease. I admit it to be doubtful whether the bacilli of the disease are still in the house or not, but

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I require you to fulfil your bargain." Surely, in such a case the tenant could rightly refuse to enter and could renounce his agreement of tenancy. I should so hold. The law would be in a regrettable state if it were otherwise. It would be gravely opposed to the elementary requirements of public health. I should respectfully but firmly dissent from any doctrine which suggested that in the case I put, the law would enable the landlord to enforce the bargain of tenancy. I must now consider the facts of this case. There has been a serious conflict of testimony, quite apart from the medical witnesses. Apart from the medical evidence it is clear that I must decide between the evidence of the plaintiff and his wife and Mr. Thorpe, on the one hand, and the evidence of the defendant and Mr. Brading and Miss Perry on the other. Distasteful though the duty is I must express my view. I have no doubt whatever that the evidence of the plaintiff and his wife and Mr. Thorpe is correct. They are the witnesses of truth. I need say no more. Now what are the facts as I find them to be ? The earlier facts are these. The Poplars is a house at St. Albans with the ordinary accommodation. There the defendant lived with her husband (Mr. Hopkins) and several children. Mr. Hopkins was engaged in the hosiery business in London. In January, 1922, he was attacked by influenza. He was attended by a Dr. Lipscombe. Other symptoms developed. In February, 1922, his sputum was examined. It showed the bacilli of pulmonary consumption. He saw a specialist. Then he went for several months to a sanatorium in Norfolk. He was in the grip of the disease. I have heard the evidence as to his history in Norfolk. I have examined the medical records. The disease was progressive. In July, 1922, he was residing again at The Poplars, and he regularly went to business in the City, although, as his medical adviser Dr. Lipscombe told me in the witness box, he (Mr. Hopkins) when he spat or sneezed or coughed in the train or the office, sent the poisonous bacilli into the air and was a peril to those around him. His condition did not improve. In August he went to Norfolk again and was examined by the sanatorium doctor, Dr. Pearson. The

disease had advanced still further. At the end of August he returned to The Poplars again and also resumed his business visits to the City. He still caused anxiety. The doctors decided that he should go to Switzerland for treatment. The disease was still more progressive. On September 11 he left The Poplars and went to Switzerland. There he died on December 24, 1922.

The agreement between the plaintiff and the defendant was made on October 14. The date fixed for the commencement of the plaintiff's tenancy was October 26. The agreement and inventory between the parties covered everything in the house except cutlery and certain linen. It included all carpets, curtains, hangings, cushions, covers, and bedding, including eiderdowns, quilts and bedspreads. It will be seen that the last date on which the sufferer occupied the house was about six weeks before the day fixed for the entry of the plaintiff and his family. Mr. Thorn Drury (defendant's counsel) ably and vigorously contended that the risk of infection had passed. Here there arise questions of importance, as to the extent to which pulmonary tuberculosis (commonly known as consumption) is infectious, and as to the modes, the risk, and the area of infection as to time and circumstance. I doubt whether the terrible prevalence of consumption in this country is fully realized. It is an appalling scourge. One person in seven dies from it. It is the largest single cause of death to those between thirty-five and forty-five. All classes suffer. In recent years science has made rapid progress. Yet I must point out that up to the day of the trial before me the medical profession had failed to find a serum that would prevent the assaults of infection or a drug that would kill the germs of the disease. The failure has been conspicuous. I hope, however, that the resources of the State may even now be achieving a success which past efforts have grievously failed to secure. Now what is the cause of this terrible measure of suffering and death from consumption? The answer is in one word, infection. The tragedy is in two words, preventible infection. The disease of pulmonary consumption is one in which the

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lung tissues are invaded by a parasitic organism (the bacillus tuberculosis) under the attacks of which they undergo alterations, become inflamed and then (unless the progress of the disease be stopped) they perish. It is fortunate that methods of treatment exist which will, in many cases, arrest the progress of the disease and may restore the sufferer to health. Congenital infection (i.e., transmuted from the body of the mother to the child ere birth) is comparatively rare. Infection by milk, however, is not uncommon, but is usually confined to children of tender years. It is clear that pulmonary tuberculosis in the adult (which causes nearly 80 per cent. of the deaths from all forms of tuberculosis) is the result of infection through direct or indirect contact with human beings already suffering from the disease. All infection is caused by tubercle bacilli. A sufferer has untold numbers of them in his body. When he spits he ejects them in millions, and so too when he coughs or sneezes or even in some cases speaks loudly or excitedly. The sputum (that which is expectorated or ejected from the chest) is the most deadly asylum of the bacilli. It is a main source of danger. It is dangerous when wet. It is even more dangerous after it has become dry. For when, after discharge from the mouth, the sputum dries, then the bacilli become free in countless millions. Invisible, sinister, and often unsuspected, they pollute the air. They are the instruments of infection. They are the seeds of death to those who cannot resist them. The other and obvious methods of infection, e.g., through a diseased mother embracing her child, are not material in this case, though it is deplorable that such methods are of wide and constant occurrence. The sputum or other ejection from the mouth of the sufferer may fix on and adhere to the walls or the floors or carpets or rugs, curtains, cushions, bedding, coverings or any kind of article. There the process of drying will proceed with the results I have stated. Now I deem it probable that the majority of cases of the disease are due to what may be called direct personal infection inflicted by the sufferer on those who live or work or associate with him. The insidious nature of the malady induces lack of care both

by the sufferer and those who are with him. The public has not been made sufficiently aware of the perils. I feel no hesitation in coming to the conclusion that a large number of persons are infected by other means than personal association with those who suffer from the disease. In the accepted text-book by Sir Douglas Powell and Sir Percival Horton Smith Hartley (which was put in evidence before me) it is said (6th ed.): "In the upper classes tuberculosis is as a rule acquired rather by the inhalation of dust from the public waiting rooms, railway carriages, trains, omnibuses, and the like, in which tubercle bacilli, derived from infected sputum, have not infrequently been found." This is a serious and most significant statement. It illustrates the ease with which infection is spread. One or two virulent doses of the bacilli are enough to cause the disease. If less virulent, then a few doses will suffice for infection. In the case now before me, however, I am not dealing with public places and the like, but with a private house. In such a case, however, the method of infection may be the same. But it is clear that if the patient has been properly trained as to his habits and carries out the medical instruction and if full regard is paid to ventilation, sunlight, cleanliness, removal of dust and dirt and the like, then the risk of infection may not be serious even to those who reside with him. Still less is the risk to those who enter the house after the patient has left if proper methods of disinfection have been adopted, particularly under medical supervision, by the use of carbolic acid or lysol or formalin, and by adequate washing, ventilation, exposure to sunlight and the like steps. At this point I must say a word or two upon an important point in the case—namely, the life of the tubercle bacillus. It has a direct bearing on the issues in the action. The bacillus has the dangerous characteristic of a most tenacious vitality. It is persistent in its power for evil. When present in animal refuse stored in a dark cellar it will retain its life and virulence for twelve months. When present in such refuse spread in the open upon pasture land it yet may retain its life and deadly properties for five months. In decomposing sputum

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it can maintain its virulence and capacity for development for six weeks or longer. If the sputum be allowed to dry, then the bacillus may preserve its virulence and capacity for six months. It can, however, be destroyed in a few days or even hours by open exposure to the direct rays of the sun and several antiseptics are fatal to it, as, e.g., carbolic acid, lysol, and formalin. I should add that I am satisfied that if the bacilli are only exposed to the light and air of an ordinary room (i.e., apart from direct sunlight), their life and danger may last for no less than five or six months. I have now stated in what I hope is simple language the main scientific aspects of the case. There now arise the serious questions of fact as to the habits of life of the defendant's husband and as to the steps taken by the defendant after her husband had left the house. I shall deal with this briefly. Broadly speaking the defendant stated that her husband slept on a balcony only; that he used a particular room only as a dressing-room; that he only used the ordinary rooms of the house to a small extent, and that he adopted the well-known precautions such as spitting into a receptacle, coughing into a handkerchief and the like. She also stated that before the plaintiff entered the house various steps were taken by her in the way of disinfection, cleaning, washing, and the like, and that the house was made clean and free from dust and dirt. It is not suggested that any fumigation took place. Fumigation, however, is a matter as to the value of which opinions differ. If I could rely on the defendant's evidence it would have an important bearing on my decision. I am unable to accept her evidence. The defendant, I regret to say, was a most unsatisfactory witness. I cannot act upon her testimony at all. She stated (inter alia) that she left the house free from dust and dirt. I have no doubt that the house was left in a most dusty and dirty condition. Dust and dirt were everywhere. Carpets, cushions, and curtains, etc., were in the same unsatisfactory state, and some of the kitchen utensils were particularly dirty. I accept without hesitation the statement of Mr. Thorpe (the agent who checked the inventory for the plaintiff), that the

house was one of the dustiest and dirtiest he had ever visited. I draw serious inferences against the defendant from that state of affairs, and I may here mention the admission of Dr. Lipscombe (a witness for the defence) that if he had known that the house was dirty he would strongly have advised the plaintiff not to enter it. There is an even more regrettable feature of the defendant's evidence. She said in the witness box that if the plaintiff had asked her what was the matter with her husband she would have answered: "Slight lung trouble only." I need only say that she was therefore prepared to state an absolute falsehood. She knew perfectly well that her husband was suffering from serious tuberculosis of the lungs. I may add that the defendant also stated that she was assisted in her alleged cleaning and disinfecting operations by her mother and two servants. None of them were called to corroborate her. Rejecting as I do the evidence of the defendant, I next point out that the defendant's medical witnesses in substance rested their opinion in favour of the defendant on the basis that her evidence was correct. I hold that evidence to be incorrect, and thus the weight of the defendant's medical witnesses is dissipated. I think that the house was, and was left, in a state which rendered it a dangerous harbour and asylum for the tubercle bacilli. I regret that I must add a word as to Dr. Lipscombe. He attended the defendant's husband for this grave disease for a long period. He knew quite well that the disease ought to have been notified to the medical officer of health, under the regulations made by the Local Government Board pursuant to the Public Health Acts. Yet, unfortunately, he failed to give any notification at all. He informs me that the omission was due to an oversight. It is, I may also add, a matter of regret that after the husband's departure for Switzerland no doctor visited the house or gave any directions or advice as to the need and the methods of disinfection. Weighing the whole circumstances I come to the conclusion that I ought to accept the evidence for and on behalf of the plaintiff not only on disputed questions of fact but also on the medical aspects of the matter. I agree with Dr. Fenton, the witness

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for the plaintiff. I also agree with the view expressed by the able and experienced medical officer of health (to whom Dr. Lipscombe should have notified the disease), and who when asked by the plaintiff for his advice as to whether he should stay in the house, said: "If in your place I should get out as quickly as possible." This, I think, was sound and wise advice. In my view the plaintiff rightly acted upon it and certainly none the less so because his wife, as he told me, had a horror of consumption.

I state my conclusions in the following order:—

(1.) I am not satisfied that the house and its contents were free from tubercle bacilli on October 26, 1922.

(2.) I am satisfied that there was a substantial risk that the house and its contents were so infected with tubercle bacilli on October 26, 1922, as to constitute an actual danger to the plaintiff and his household.

(3.) Whilst recognizing the difficulties of inference on the point I should hold (if necessary) that in fact the house and its contents were so infected with tubercle bacilli on October 26, 1922, as to render it unsafe for occupation.

I therefore rule that the house was not reasonably fit for habitation. It follows that the plaintiff was entitled to renounce the tenancy and to quit the house. It also follows that he is entitled to damages. I assess them at 130*l.*

In view of what I have said it is not needed that I should deal fully with the further claim of the plaintiff upon an express warranty. I say a few words only upon it. Accepting as I do the evidence by and on behalf of the plaintiff the facts are these. When inspecting the house with a view to a possible tenancy the plaintiff's wife saw the defendant. The defendant incidentally mentioned that her husband was in Switzerland. This disturbed the plaintiff's wife, although for reasons of delicacy she refrained from putting questions to the defendant herself. But she went straight to the firm of estate agents who had been entrusted by the defendant with the letting of the house. She saw one of the partners for the express purpose of asking whether Mr. Hopkins was suffering from consumption. She told him that the defendant

had mentioned that her husband was in Switzerland, and she bluntly asked: "Is he there for consumption?" Thereupon the agent said: "No, he is not suffering from consumption. He is away on business, and he is often away." The plaintiff's wife accepted this statement. But for it she would not have entertained for a moment the idea of a tenancy. She relied on the statement, and so the agreement of tenancy was ultimately made. In my view the statement should be treated as a warranty. I need not cite the body of decisions. They will be found in *Heilbuts' Case* (1) and *De Lassalle* v. *Guildford* (2) and the well-known text-books. I shall not deal with the question as to whether that warranty is in the nature of a condition or as to the measure of damages for breach. The points do not call for decision in view of my earlier ruling. Nor do I deal with the points on the question of rescission if the agents' statement is to be regarded as a misrepresentation only. Several of the relevant cases are cited in *Armstrong* v. *Jackson.* (3)

It is proper to add that no charge of fraud was made against the agent, although I am bound to say that he acted carelessly in giving an answer when devoid of information as to the facts. Upon the question as to the extent to which a principal may be bound by the warranty of an agent, reference may be made to *Udell* v. *Atherton* (4) and the later cases in which that decision is discussed, to *Brady* v. *Todd* (5) and to *Kettlewell* v. *Refuge Assurance Co.* (6)

Such is the case. I venture to add the remark that far wider and more effective steps should be taken to inform the public of the ways in which the disease of consumption is spread and to tell them of the means by which the risks of infection can be lessened. I must give judgment for the plaintiff for 130*l.* with costs.

Solicitor for the plaintiff: *W. G. A. Edwards.*

Solicitors for the defendant: *Stanley Robinson & Commin.*

(1) [1913] A. C. 30.
(2) [1901] 2 K. B. 215.
(3) [1917] 2 K. B. 822.
(4) (1861) 7 H. & N. 172.
(5) (1861) 9 C. B. (N. S.) 592, 606.
(6) [1908] 1 K. B. 545, 551; [1909] A. C. 243.

F. C.

C. A.

1922
June 21, 22, 23, 26, 27.

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Feb. 13, 14; *April* 11, 12, 13; *June* 12.

[IN THE COURT OF APPEAL.]

RUSSIAN COMMERCIAL AND INDUSTRIAL BANK *v.* COMPTOIR D'ESCOMPTE DE MULHOUSE AND OTHERS.

[1920. R. 135.]

Bank—Russian Head Office—London Branch—Branch Manager's Authority—Power to sue—Russian Revolution—Legislation nationalizing Banking—Dissolution of Head Office—Action by Manager—Revocation of Authority—Estoppel.

In 1914 a Russian Bank had its head office in Petrograd and a branch office in London, the manager of which was authorized by a power of attorney to transact business for and bring actions in the name of the bank. By the direction of the Petrograd office the London branch deposited with a London Bank certain Brazilian and Chinese Government bonds to be held to the order and on account of a French Bank as security for a banker's credit opened by the French Bank for the benefit of the Russian Bank.

In and after 1918 the Russian Republic by various decrees and orders nationalized banking in Russia by taking over the assets, share capital and management of all private banks and vesting them in a State Bank, then in a People's Bank, and ultimately in a Government department. Subsequently the manager of the London branch of the original Russian Bank agreed with the French Bank to pay off the amount due to the French Bank on the banker's credit in return for the bonds. The amount was paid, but the French Bank refused to release the bonds.

In an action brought in the name of the Russian Bank by the manager of the London branch against the French Bank and the London Bank for the return of the bonds and damages for their detention:—

Held, by Bankes and Scrutton L.JJ., Atkin L.J. dissenting:

(1.) that in consequence of the decrees and orders of the Russian Republic the Russian Bank had ceased to exist, and that with its extinction the authority of the manager of the London branch to bring the action in the Bank's name had lapsed;

(2.) that the defendants were not precluded by estoppel or otherwise from relying on this absence of authority as a defence to the action.

Daimler Co. v. *Continental Tyre Co.* [1916] 2 A. C. 307 followed.

Richmond v. *Branson* [1914] 1 Ch. 968 distinguished.

Held, by Scrutton L.J., that the change of circumstances effected by the Russian legislation of itself involved a termination of the branch manager's authority.

Judgment of Sankey J. affirmed.

APPEAL from the judgment of Sankey J. in an action tried before the learned judge without a jury.

Detailed statements of the facts will be found in the written judgments of Scrutton and Atkin L.JJ.

The plaintiffs, the Russian Commercial and Industrial Bank, in January, 1914, carried on the business of bankers at Petrograd, London, Paris, and elsewhere. They were a corporation established under Russian law in 1889 with articles of association, an agreed translation of which was used at the trial. The plaintiffs had a branch in London of which the manager was one V. C. B. Jones to whom on November 20, 1914, they gave a power of attorney conferring upon him very wide powers, including the right to represent them as plaintiff, and to prosecute or defend any action, suit or other proceeding relating to their affairs.

In January, 1914, the plaintiffs, through their head office in Petrograd, agreed with the defendants, the Comptoir d'Escompte de Mulhouse, that in consideration of the said defendants opening an acceptance credit for them to an amount of 800,000 marks they would repay that sum with interest and would deposit with the defendants, the London County Westminster and Parr's Bank, Ld., in London by way of security for the repayment of the said amount and interest, 29,000*l.* United States of Brazil 4 per cent. bonds and 29,000*l.* Chinese 5 per cent. 1912 bonds, it being a term of the agreement that the plaintiffs' London branch should collect the coupons for their own use as they fell due. In pursuance of this agreement the plaintiffs' London branch in January, 1914, deposited the bonds with the London County Westminster and Parr's Bank to the order of the Banque Nationale de Crédit, Paris (1), and the following correspondence took place between the parties :—

January 21, 1914. London County Westminster and Parr's Bank to Banque Nationale de Crédit, Paris : " Please note that the Russian Commercial and Industrial Bank here have lodged with us 29,000*l.* Chinese 5 per cent. 1912 Bonds and 29,000*l.* United States of Brazil 4 per cent. Bonds for

(1) It appeared that the Comptoir d'Escompte de Mulhouse was acting by the direction of the Banque Nationale de Crédit, Paris.

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account of your Mulhouse office, respecting which we await your instructions."

Paris, January 22, 1914. Paris Branch of the Comptoir d'Escompte de Mulhouse to Mulhouse office of the same bank: "We have the honour to inform you that the London County and Westminster Bank advise us to-day that they have received for your account from the Russian Commercial and Industrial Bank, London, 29,000*l.* Chinese 5 per cent. 1912 Bonds, 29,000*l.* United States of Brazil 4 per cent. Bonds. Please give us your instructions in connection with these bonds in order that we may communicate with the London County and Westminster Bank."

January 23, 1914. Comptoir d'Escompte de Mulhouse to London County Westminster and Parr's Bank, London: "The Banque Nationale de Crédit in Paris inform us that they have deposited with you for our account by order of the Russian Commercial and Industrial Bank the following bonds:—

29,000*l.* Chinese 5 per cent. 1912 Bonds.

29,000*l.* United States of Brazil 4 per cent. Bonds.

We request you to place these bonds with our documents and notify us accordingly. Please also note that the coupons when they become due are to be remitted free of value to the London Branch of the Russian Commercial and Industrial Bank."

At this time the Comptoir d'Escompte de Mulhouse was domiciled at Mülhausen in Germany, but when the writ in this action was issued Mülhausen had been ceded to France, and this bank was then carrying on business in that country.

In November, 1917, the Russian Revolution broke out. The Russian Socialist Federal Soviet Republic took upon itself the government of Russia and in the period between December, 1917, and January, 1920, passed numerous decrees and issued various orders purporting to nationalize the banks in Russia. (1)

On December 16, 1918, the Comptoir d'Escompte de

(1) An agreed translation of the decrees and orders material to this case will be found in the Note on p. 674, post.

Mulhouse, hereinafter called the French Bank, wrote to the London County Westminster and Parr's Bank, hereinafter called the London Bank, as follows, omitting formal parts: "Alsace having fortunately again become French, we beg to remind you of the security which was lodged with you as guarantee for our account by the Russian Commercial and Industrial Bank in St. Petersburg, according to your letter of January 23 [qu. January 21], 1914, consisting of 29,000*l.* Chinese 5 per cent. 1912 Bonds 29,000*l.* United States of Brazil 4 per cent. Bonds. We trust that in view of the events in Russia during March, 1917 (1), you have no longer remitted the coupons of these bonds to the London Branch of the Russian Commercial and Industrial Bank notwithstanding our instructions in our letter of January 23, 1914. We shall be glad to hear from you on this matter."

After some correspondence Mr. V. C. B. Jones on behalf of the plaintiffs wrote to the French Bank on April 15, 1919: "With reference to the pre-war acceptance credit for 800,000 marks opened by yourselves in favour of our head office, against which we deposited with the London County Westminster and Parr's Bank in London the following securities" (naming them) "we are surprised to learn from this Bank that you have cancelled the standing instructions that the coupons were to be handed to us as they fall due. In view of the fact that according to the present exchange value of the German mark the advance is now over-covered by more than 100 per cent. we consider that this action on your part is entirely unjustified, but in order to avoid any unpleasantness we have obtained the permission of the British Treasury to repay you the amount of the advance at once. Will you therefore kindly send us a complete statement of the interest account to date showing when the bills became past due and the total amount of our head office's indebtedness to you. We will then either agree a rate of exchange with you or we will purchase the necessary mark notes to discharge our liability. We shall be much obliged if you will give this

(1) On March 14, 1917, the Imperial Government of Russia came to an end, and the Provisional Government came into power.

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matter your early attention, as we are anxious to obtain the control of our securities lodged with your bankers in London as early as possible. Yours faithfully, The Russian Commercial and Industrial Bank. Signed V. C. B. JONES."

Negotiations followed between V. C. B. Jones purporting to act on behalf of the plaintiffs, M. Maurice Montebrun acting for their Paris branch, and the French Bank, and in the result on September 15, 1919, the amount due from the plaintiffs to the French Bank was agreed at 1,090,000 marks; the plaintiffs' London branch at the request of the French Bank agreed to remit this sum to the Banque Nationale de Crédit, Mayence, and the French Bank agreed to deliver up to the plaintiffs' London branch on September 22 the Brazilian and Chinese bonds. The plaintiffs' London branch duly remitted the 1,090,000 marks to the Banque Nationale de Crédit, Mayence, but on applying to the London Bank for the bonds they were informed that that Bank had received no instructions to hand over the bonds. The ground of the refusal to give necessary instructions was that the original transaction was on behalf of the plaintiffs' head office in Petrograd, and that the London branch could not give a valid receipt for the bonds if they were handed over to them.

On January 23, 1920, the writ was issued against the French Bank and the London Bank. The plaintiffs claimed a return of the bonds and damages for their detention. The defendants pleaded, among other defences, that the bonds were deposited with the London Bank on behalf of the head office in Petrograd of a Russian corporation which formerly carried on a banking business under the style or title of the Russian Commercial and Industrial Bank, but that, as the result of decrees and orders of the Russian Socialist Federal Soviet Republic dated December 14, 1917, and January 26 and April 12, 1918, that corporation had ceased to exist. They admitted that they had not delivered up the bonds to the plaintiffs, and they required proof that the plaintiffs had authority to receive them.

Sankey J. held that Mr. Jones' power of attorney had lapsed either because the plaintiffs as a legal entity had

ceased to exist or because a state of circumstances had supervened which was never contemplated when the power of attorney was given; that the defendants were not debarred from disputing Mr. Jones' authority, notwithstanding *Richmond* v. *Branson* (1), and were not estopped from disputing that authority by any conduct or representation on their part. He therefore gave judgment for the defendants.

The plaintiffs appealed.

Schiller K.C., *Micklethwait* and *Wishart* for the appellants.

R. A. Wright K.C. and *O'Hagan* for the respondents.

The arguments of counsel dealt mainly with the legislation of the Russian Socialist Federal Soviet Republic and its effect upon the appellant Bank and its London branch and upon the authority of Mr. V. C. B. Jones, the manager of that branch. Counsel for the appellants contended that the effect of the legislation was not to extinguish the appellant Bank but to amalgamate it as an existing entity with the State or People's Bank or the Central Budget and Accounts Administration department of the Soviet Government. They pointed to numerous letters written and acts done by the London branch as indicating that this branch was still existing and acting. They insisted that Mr. Jones' authority had never been either expressly or tacitly revoked, and that, if it had been, the respondents could not rely on his want of authority as a defence to the action: *Richmond* v. *Branson* (1); and further that the respondents, the French Bank, having received payment from Mr. Jones as manager of the London branch were estopped from denying his authority to give a good discharge for the bonds and to bring the action in the name of the appellants.

Counsel for the respondents contended that the appellant Bank and its branches had ceased to exist and that Mr. Jones' authority had lapsed in consequence of the Bank's extinction and of the fundamental change of circumstances effected by the legislation. They further contended that the respondents were in no way precluded either by estoppel or otherwise

(1) [1914] 1 Ch. 968.

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from asserting Mr. Jones' want of authority to bring the action, citing on this point *Daimler Co.* v. *Continental Rubber Co.* (1) and distinguishing *Richmond* v. *Branson.* (2)

Cur. adv. vult.

June 12. The following written judgments were delivered.

BANKES L.J. This appeal, like others that have recently been before this Court, raises difficult and important questions arising out of what must now be accepted as the legislation of the Soviet Government of Russia in the years 1917, 1918 and 1920. In the case of *Aksionairnoye Luther* v. *Sagor* (3), this Court held that the effect of the recognition by the Government of this country of the Soviet Government as the de facto Government of Russia had been to render it impossible to impugn the validity of the decrees of that Government passed after December 13, 1917. The recognition by the Government of this country above referred to was first made in the early part of the year 1921.

The appellant Bank was formed in Russia in the year 1889 as a joint stock company under articles of association to some of which it will be necessary to refer. It carried on business in Russia and it had branches abroad, including a branch in London. Early in the year 1914 an arrangement was come to between the head office of the bank in Petrograd and the Comptoir d'Escompte de Mulhouse whereby the latter agreed to open an acceptance credit for the former for 800,000 marks against a deposit in London of collateral security, and the head office in Petrograd instructed the London branch to make the necessary deposit of bonds for the purpose with the London County Westminster and Parr's Bank in London. The deposit was duly made, and for a long time the London branch of the appellant Bank collected the coupons on the bonds as and when they became payable. On December 14, 1917, the Soviet Government passed their first decree nationalizing all banks in Russia. The subsequent decrees,

(1) [1916] 2 A. C. 307. (2) [1914] 1 Ch. 968.
(3) [1921] 3 K. B. 532.

orders, and instructions to which it will be necessary to refer are those dated January 26, April 12, July 10, September 20, December 10, 1918, and January 19, 1920.

From the date of the first of these decrees until after the commencement of the present action the business of the London branch of the Russian Commercial and Industrial Bank was carried on under the management of a Mr. Jones without any alteration in the title under which the business was conducted or any public intimation of any change in the constitution of the branch. Mr. Jones was called as a witness at the trial, and his then account of his position was that he was appointed manager of the London branch in 1914 under a power of attorney, that he had had no communication with the head office at Petrograd since the Bolshevist edict of December, 1917, that since that time he had been carrying on the business of the branch for the benefit of whom it might concern, but that he claimed to have been carrying it on all the time under his power of attorney and as a branch of a still existing Russian and Commercial Bank at Petrograd. Since the trial before Sankey J. further materials have come to light in the shape of correspondence between London and Petrograd subsequent to the date mentioned by Mr. Jones in his evidence, and by the discovery of a material decree of the Soviet Government of January 19, 1920, which was not brought to the learned judge's attention. Further evidence has also been given by Russian lawyers as to the effect of that decree, and of the other decrees, orders, and instructions to which the learned judge's attention had already been directed. This Court is therefore in possession of more material upon which to found its judgment than was before the learned judge. The all important question, as it appears to me, is whether or not the true effect of the Soviet legislation has been to destroy the Russian and Commercial Bank as an entity or juridical person; because if it did, nothing that Mr. Jones said or did in this country could have preserved the existence of a branch in this country of a Russian bank which had ceased to have any legal existence.

Before considering the effect of the Soviet legislation I

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desire to make a few observations in reference to Mr. Jones' position and conduct. He was undoubtedly placed by the events in Russia following on the deposition of the Tsar in a position of great difficulty and responsibility. Until it was known whether the Government of this country could recognize the Soviet Government it was impossible to foretell whether the decrees of that Government were to be regarded as binding legislation or as the mere lawless acts of revolutionaries. Communication with Russia was difficult. The branch under Mr. Jones' management was responsible to clients and customers. It is little to be wondered at that Mr. Jones under these circumstances should have considered it his duty to carry on the business of the branch for the benefit of whom it might concern. The further correspondence discovered since the trial throws a good deal of light upon Mr. Jones' position. In his letter of March 28, 1918, to Mr. Goldman, an official in the appellants' Petrograd office, he expresses very clearly what was obviously the then position where he says, "I suppose it is useless for me to ask you what is the position of the Bank for probably no one in the world can know what its position is." In the same letter he says: "Mr. Bahatranz has arrived and has given me a very interesting account of the conditions in Petrograd. He gave me your message asking me to carry on for the time being as if we were an independent institution, and upon that authority reinforced by your telegrams I will endeavour to do the best I can for the Bank. Our position is difficult but at my request Sir William Plender has investigated our financial resources and I have no doubt that I shall have his authority to enable me to satisfy our bankers that our position here is satisfactory"; and again in the same letter: "I felt that if an application were successfully made for an administrator to be appointed in the interests of the English shareholders he would almost certainly be antagonistic to the Bank as a whole, and consequently it would be most desirable that the staff should be in such an independent position that they could refuse to give any assistance or information, but rather on the other hand defend the Bank's position." Then in a

letter of January 2, 1920, the London branch write to "Our Odessa Branch," and I want to read this passage: "Briefly the situation is this: when the Bolsheviks assumed control in Petrograd and published their proclamations nationalizing the banks this involved serious losses to many Englishmen who had advances in the Russian banks. We were then invited by our London bankers, to whom the head office of our bank are under heavy liabilities, to inform them of the financial position of this branch. We thereupon disclosed our exact position to them including all the assets of the bank under our control in London, and in view of the fact that they were satisfied that the London office was perfectly solvent as regards its own English liabilities, they agreed to abstain from taking any action in regard to our assets provided we gave the undertaking not to dispose of any of our Russian assets which would thereby weaken the resources of the London branch. Thus, instead of being wound up, we were left free conditionally to carry on." Again, on June 3, 1918, he writes to Mr. Jarochinsky, another official in Petrograd: "Since the date when the Bolsheviks assumed control in Russia our position here has always been difficult as you may well imagine must have been the case when we did not know whether the bank in Russia existed or not."

As I have already indicated the all-important question in my opinion in this case is whether the Bank was still in existence at the date when this action was commenced. The circumstances leading up to the action were as follows. By the early part of the year 1919, owing to the then exchange value of the German mark, it appeared that it would be greatly to the advantage of the business of the London branch as then carried on by Mr. Jones, if it could procure the release of the securities held by the London County and Westminster Bank on repayment of the advance of 800,000 marks. Negotiations were accordingly opened at the instigation of Mr. Jones, and on September 8, 1919, a letter was written on behalf of the London branch to the Comptoir d'Escompte de Mulhouse giving them the name of the gentleman who was authorized to come to a decision with them in regard to the acceptance

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credit against which security had been deposited. An arrangement was come to which is embodied in the letter from the Mulhouse Bank to the Paris branch of the appellant Bank dated September 15, 1919. The amount referred to in that letter was duly placed to the credit of the Mulhouse Bank; but that bank subsequently apparently regretted that they had not insisted upon a higher rate of exchange, and finally refused to release the securities, though they did not return and never have in fact returned the money.

Under these circumstances the present action was brought. The writ was issued in the month of January, 1920, and by their statement of claim the Russian Bank claimed a declaration that they were entitled to a return of the bonds and to the delivery up of the same and to damages for detention, and for an account of all dividends or interest received on the bonds, or alternatively for damages for breach of contract. By the defence delivered on June 22, 1920, the defendants in substance put the plaintiffs to the proof of their title to the bonds. The action appears to have lain dormant for a year until, in June, 1921, the defendants obtained leave to amend their defence, by which time the Government of this country had recognized the Soviet Government as the de facto Government of Russia. The amended defence set up that fact and relied on some of the decrees already referred to and alleged that the Russian Bank had ceased to exist, and in substance that the action was not maintainable.

It was urged before us that such a plea was not matter of defence and that the objection could only be taken in an interlocutory proceeding to stay the action. Under ordinary circumstances an application to stay would be the proper procedure. In the present case an order was made giving the defendants leave to amend and presumably leave to amend in order to raise matters which had arisen pending the action. The amended defence was pleaded to, and no application to strike it out was made. Under these circumstances I consider that the learned judge at the trial was fully justified in dealing with the issues upon the pleadings

and that the appellants' objection to the judgment on this ground fails.

The making of the agreement under which the Comptoir d'Escompte de Mulhouse undertook to return the securities upon being paid the amount agreed upon was not disputed. The defence set up was fourfold: (*a*) that the appellant Bank had ceased to exist at the time of action brought; (*b*) that even if it had an existence as a legal entity the conditions of its existence were such that the power of attorney, under the authority of which Mr. Jones claimed to have properly brought the action, had lapsed; (*c*) that the agreement relied upon had been made under a mutual mistake; (*d*) that the agreement had come to an end owing to the doctrine of frustration. In addition to a general denial the plaintiffs relied upon an alleged estoppel and upon ratification by a provisional liquidator appointed after judgment. The learned judge who tried the case decided in the respondents' favour on the grounds of mutual mistake and frustration. He gave no decision on the first two points and he negatived the alleged estoppel. On this last point I agree with his conclusion. I do not see any evidence of either representation or conduct upon which the estoppel can rest. If either the Paris branch or the London branch offered to repay the loan on an undertaking to hand over the securities I think that the Comptoir d'Escompte de Mulhouse were entitled to accept the offer without thereby becoming estopped from setting up that neither branch had authority either to make the offer or to receive the securities. The Comptoir cannot of course approbate and reprobate. They cannot claim to retain the money and refuse to hand back the securities; they have never taken up this attitude, though they do not appear to have shown any great anxiety to return the money. Their attitude has rather been, "We make no claim to hold the bonds, but we do require you to prove your title to them." I am not prepared to agree with the view of the learned judge upon either of the points upon which he decided in favour of the respondents, as I cannot find any evidence which satisfies me that either party was under any mistake as to the facts

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when the agreement of September, 1919, was come to, or which in my opinion supports a case of frustration.

If the respondents are entitled to succeed it must, in my opinion, be upon one or other of the first two points taken by them. Both points to some extent depend upon the construction to be placed upon the decrees of the Soviet Government. Upon this point the evidence of Russian lawyers has been taken both before and since the hearing before Sankey J. These witnesses are diametrically opposed in opinion to each other, the witnesses for the respondents being of opinion that the effect of the decrees was to completely extinguish the appellant Bank; the witness for the appellants being of opinion that in spite of the decrees the bank retained an existence as a legal entity. The grounds upon which this latter view was based are technical and under other conditions would be regarded as sound. In substance they amount to this: that according to Russian law, as it existed before the coming into power of the Soviet Government, a company could only be put out of existence by a process of winding up; that this Russian law has never been expressly abolished and that consequently, to use the witness, Dr. Idelson's, own expression, the Russian Bank being a joint stock company in order to die must do so in the prescribed way. This no doubt is a very sound opinion under what may be described as normal circumstances, but Dr. Idelson himself in a later portion of his evidence indicates how exceptional the circumstances are. He was being asked as to the effect of the decree of January 26, 1918, confiscating the capital of all the banks. His reply is instructive. He says: "It is a very difficult question of company law, and I may say of principles of company law, because I do not know of a case where the Sovereign State has declared that the capital ceases to exist. (Q.) You do not know of a precedent for a great many things that the Bolshevist Government have done? (A.) That is so, and therefore I am afraid that my own opinion is of little value if I cannot base my opinion on some precedent or some law. (Q.) But you have no doubt that the object of this legislation is to merge the identity of the private banks in the State

Banks? (A.) I have no doubt whatsoever that that is the object of the legislation." If I had had to decide on the evidence of the Russian lawyers as given before Sankey J. I should have preferred the view expressed by Mr. Chebanoff to that held by Dr. Idelson. The further evidence given by them since the trial confirms me in that view. To a large extent, and in the main, the question is however one of construction of the decrees themselves, of which there are agreed translations, and which as translated are to a large extent free from technical terms. Under such circumstances this Court is, I think, free to put its own interpretation upon the language and is not bound to accept the view of either set of witnesses : see the speech of Lord Chelmsford in *Di Sora* v. *Phillipps*. (1) The Court must, I think, be guided by the views of these witnesses as to which of the documents called respectively orders, decrees, resolutions, or instructions have the force of law and as to the meaning of any technical terms. On these points I accept the view of the defendants' witnesses. The more I study the documents which are in evidence the more impressed I become with the conviction that the policy underlying them, which finds expression in their language, is the policy of destruction, and the absorption is the absorption of extinction. It appears to me altogether out of place to attempt to apply the law of Tsarist Russia to the interpretation of this class of confiscatory legislation as is done by Dr. Idelson, and almost fanciful to compare the absorption contemplated and carried out by Soviet legislation with the amalgamation of companies or businesses such as we are familiar with in this country.

I do not propose to examine the decrees in any detail. The preamble of the decree of December 14, 1917, sufficiently indicates the object in view. It is : "Decree on the Nationalizing of Banking. In the interests of the proper organization of national economic life, of the resolute eradication of banking and speculation, and of the complete liberation of the workers, peasants, and the whole labouring population from exploitation by banking capital, and also with the

(1) (1863) 10 H. L. C. 624, 636.

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object of establishing a single People's Bank of the Russian Republic—a bank genuinely serving the interests of the people and the poorest classes, the Central Executive Committee hereby decrees." Even assuming that this decree is merely a declaration of policy not to become effective until the method of amalgamation was determined by special decree, the instructions of December 10, 1918, are I think such a special decree as was contemplated. This is the opinion of Mr. Krougliakoff and I see no reason to doubt the correctness of his view, which is I think borne out by the language of the document itself. The method of amalgamation indicated by this document is in my opinion a method of extinction. Assuming however that the amalgamation process was one which preserved the entity of the various amalgamated banks, the amalgamated entity was constituted the State or People's Bank, both names being apparently used indifferently for the same institution. By January 19, 1920, the Soviet policy had developed sufficiently to enable it to declare that there was no longer any necessity for the existence of separate banking institutions and no necessity to use further the People's (State) Bank, and as a consequence the decree was made for the complete abolition of that bank with all the staffs of officials, establishments, and institutions forming part thereof, and for the transfer of all the assets and liabilities of that bank to the Central Budget and Accounts Administration. Whatever may have been the position of the joint stock banks up to that time, I think that the language of this decree admits of no doubt, that they could not have maintained any separate existence after the abolition of the People's or State Bank, into which for the purposes of argument only I assume that they had been transferred as living entities. I cannot in face of the language used accept Dr. Idelson's contention that the fact that no mention is made of the private banks by name in the decree is sufficient to protect them from the sweeping language of the Soviet Legislature.

This question whether the plaintiff Bank retained any separate existence as a legal entity may be tested also from

a different point of view—namely, from that of its constitution. Did its constitution permit of its continued existence as a legal entity in face of the Soviet legislation? The plaintiff Bank was incorporated with articles of association to which it is unnecessary to refer in detail. It is sufficient to point out that the company was constituted as a joint stock company with a capital consisting of shares; that the management of the affairs of the Bank was entrusted to a board of directors and a council; that the board was required to meet not less than once a week, and the council not less than once a month; that an ordinary and special reserve fund had to be created in the method directed in the articles, and by art. 83 that if the losses of the Bank not covered by the reserve funds reached the amount equal to one quarter of the share capital, then the Bank should be bound to cease operations, and to go into liquidation unless the shareholders brought up the share capital to its former figure. I do not see how it is possible in face of the decrees and orders of the Soviet Government to hold that a company thus constituted can have continued in existence. The only ground suggested by the evidence is that according to Russian law, as it existed before the revolution, the company could not be held to have ceased to exist unless and until it was wound up in the recognized manner. I cannot think that this is the true result of the legislation to which I have referred, and which is so drastic in its methods, and so expressive in its language, that I feel that the true legal effect to be given to it must be a complete sweeping away of institutions which in normal times would have required to be wound up in order to get rid of them.

During the argument it was suggested that the Soviet Government must have intended to legislate so as to preserve the businesses carried on by the branches abroad of the banks which were absorbed in the People's Bank. I cannot take this view. The legislation and the evidence afforded by the correspondence appear to me to indicate that if the Soviet Government or the People's Bank gave the question of the foreign branches any thought at all it was to determine that their business was no concern of theirs, unless they were

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prepared to carry it on as branches of the State Bank. Having regard to the form of the decrees I cannot come to any other conclusion than that the Soviet Government intended to completely destroy the banks which they absorbed and, so far as it was in their power to do so, to finally end their existence. The fact that the People's Bank allowed persons to make use of the cheque books originally issued by what I look upon as the defunct banks, does not appear to me to be a material fact. The Soviet Government had possessed themselves of the entire assets of these banks, and had confiscated all their capital. To honour cheques for small amounts drawn by customers of these banks on forms issued by these banks, before the decrees were issued, does not in my opinion afford evidence of a desire to maintain the private banks in existence. I think that all the correspondence which is in evidence is quite consistent with this view. When a revolution takes place in so vast a country as Russia, involving such drastic changes from the previously existing state of things as were involved in the Soviet legislation, it takes time before people accept the change as permanent, or realize their full effect, and meanwhile they carry on as best they can until they become certain of their ground. If this is the course adopted by a branch of a bank which has been abolished by the Soviet Government, customers have to be accommodated and transactions reported. This seems to me to be what a great deal of this correspondence amounts to. The letter of April 3, 1918, from Petrograd to London, is I think a typical illustration of what was going on. Mr. Jones had telegraphed to the Russian Commercial Bank, Petrograd, instructing them to pay a sum of money to a named lady, presumably a customer, or a friend or relation of a customer, of the London branch. The reply from Petrograd is on paper stamped: "From the Foreign Section of the IV. Branch of the Popular Bank of the Republic of Russia, formerly the Russian Commercial & Industrial Bank," to "Messrs. The London Section of the IV. Branch of the Popular Bank of the Republic of Russia, London," and signed by a director for the IV. Branch of the Popular

Bank of the Republic of Russia. Mr. Jones replies to this by a letter addressed to: "Our Head Office, Petrograd." I see no reason to draw any distinction between the correspondence between Petrograd and London and between London and other Russian towns. The Petrograd office had apparently definitely assumed the position that the branches of the absorbed banks had ceased to be branches of the original parent stock, and had become branches of the People's Bank. The branches were carrying on business without accepting and acknowledging this position, and awaiting a time when some decisive action would be taken, or some definite decision arrived at. It does not appear to me to be at all necessary to decide what was or is the exact legal position of the persons carrying on the business of the branches after the parent Bank had been abolished. Confiscatory legislation such as that of the Soviet Government must necessarily lead to difficulties and hardships, and I cannot see any sufficient justification for attempting to construe that legislation so as to minimize the difficulties or reduce the hardships.

The conclusion at which I have arrived renders it unnecessary to consider any of the other questions which have been discussed. I think that the appeal fails and must be dismissed, but without costs, and that the judgment below must be amended by striking out so much of it as directs payment of costs either to or by the plaintiffs, as a non-existent person can neither receive nor be ordered to pay costs.

SCRUTTON L.J. On the record of proceedings the Russian Commercial and Industrial Bank, whom I call the Russian Bank, sues Le Comptoir d'Escompte de Mulhouse, whom I call the French Bank, and the London County Westminster and Parr's Bank, whom I call the London Bank, to recover certain bonds said to belong to the Russian Bank deposited with the London Bank to the order of the French Bank, and to recover damages against the French Bank for breach of contract to deliver up the bonds. The London Bank merely holds the bonds as agent of the French Bank, who are the real defendants. The defence of the French Bank in substance

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is that the persons claiming in the name of the Russian Bank are not really the Russian Bank; that the Russian Bank has been either extinguished or merged in another bank, which itself has been extinguished by legislation of the Soviet Government of Russia, and that the former servants of the Russian Bank at its former branch in London have not the right to use the name of the Russian Bank, or to make a good claim to, or give a good receipt for, bonds originally the property of the Russian Bank. These former servants say that they are the present servants and agents of the Russian Bank, which is not dead, but still alive, at any rate in countries outside Russia, and that they have the right to use its name under a power of attorney given before the war and before the Soviet legislation, and recover its property outside Russia which is not affected by the Soviet legislation. They make no secret of the fact that they are acting in concert with British creditors of whom some were creditors of the Russian Bank before the Soviet legislation, and others creditors of the business carried on in England under the name of the Russian Bank since the Soviet legislation. Undoubtedly the claims of English creditors to be paid their just debts due from the Russian Bank out of assets originally the property of the Russian Bank must be viewed with sympathy by English Courts. But the sympathy must not lead the English Courts to strain or pervert the legal principles they administer in order to produce a result favourable to English citizens. Further, it is obvious that the question of the position of branches out of Russia of banks whose head offices were in Russia, after the Soviet legislation, and of assets and creditors out of Russia, may raise innumerable questions of great importance not now present to the mind of the Court, a consideration which requires the Court to restrict itself to deciding the exact questions raised by the present pleadings and evidence, for fear of prematurely deciding matters not really before it.

The facts giving rise to the present case are as follows. Before 1917 the Russian Bank was a company formed according to Russian law, with its head office in St. Petersburg. Its

shareholders were either registered in their own names or held bearer shares with coupons attached. The government was in the hands of directors elected by the general meeting from candidates proposed by the council, and a council was elected by the general meeting from shareholders with a certain qualification in shares. The directors with the concurrence of the council might appoint managers and assistant managers on giving them detailed instructions. The directors might, if authorized by the general meeting of the shareholders, open branches which should be secured by the entire assets of the bank, and the staff and regulations for each branch were to be determined by the board "on the exact basis of these Articles of Association." Under these articles the board opened a branch in London, a Mr. Jones being the "Acting Manager pro tempore," and in November, 1914, gave him a power of attorney authorizing him to carry on in the name of the Bank specified business in the United Kingdom, including the conduct of litigation, and ratified and confirmed all that he might do up to the time when he knew of any revocation of his authority. In 1914 the head office of the Russian Bank in St. Petersburg arranged through its Paris branch with the French Bank (then German) for a loan of 800,000 marks to the head office, secured by a deposit of certain bonds with the London Bank on account of the French Bank. The coupons on the bonds were to be delivered on their due date to the London branch of the Russian Bank. The head office accordingly instructed their London branch to deliver the bonds to the London Bank for account of the French Bank, and this was done. The head office then authorized the London branch office to draw for 800,000 marks on the French Bank on account of the head office, which was done "by order and for account of our head office St. Petersburg." The London branch received the coupons during the war, during which period communications between the Russian Bank in St. Petersburg and London on the one hand, and the Bank of Mulhouse, then in Germany, were of course impossible.

Between December, 1917, and January 19, 1920, a set of

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decrees were passed by the Soviet Government in Russia, agreed translations of which were supplied to us in the Court of Appeal; some of them were not brought to the attention of the judge below. The first decree, that of December 14, 1917, contained the following clauses: "(1.) Banking is declared a State monopoly. (2.) All existing joint stock banks and banking houses are amalgamated with the State Bank. (3.) The assets and liabilities of the liquidated banks are taken over by the State Bank. (4.) The method of amalgamation of joint stock banks with the State Bank shall be determined by a special decree. (5.) The management of the business of joint stock banks is temporarily placed in the charge of the Council of the State Bank." The second decree, dated January 26, 1918, annulled all bank shares and required the delivery to the State Bank of the certificates representing them, and transferred on the basis of complete confiscation "the share capital (stock reserve and special)" to the State Bank of the Russian Republic. This language appears to point to the reserve funds, ordinary and special, mentioned in arts. 80 and 81 of the Russian Bank Articles, and the assets, capital or stock other than the reserve funds. The third decree, an order of the Principal Commissary of the People's Bank, informed the public that "the administration of the late private banks is abolished as from April 1, 1918, and its functions are handed over to the People's Bank of the Russian Republic." On July 10, 1918, a constitution was adopted of which the second chapter, art. 3 (*e*), confirmed "the transfer of all the banks into the ownership of the Workmen-Peasants' State as one of the conditions of the liberation of the toiling masses from the yoke of capital." On September 20, 1918, the Council of the People's Commissaries by resolution recognized that the decree of December 14, 1917, established the principle of monopolization of banking in Russia by nationalization (or liquidation) of all existing private banks, and instructed the Minister of Finance urgently to carry this out in the case of credit institutions still existing. This he did on December 10, 1918, by an elaborate order which provided (s. 4) that every bank continuing to exist

and not liquidated was either the former State Bank, now called the People's Bank, or a branch of that Bank reorganized from the former private banks, and called an affiliated branch of the People's Bank, and (s. 6) carrying on business for the account of the State (that is the People's) Bank. Lastly, on January 19, 1920, for reasons appearing in the decree, the People's (State) Bank itself was abolished, "with all the staff of officials, establishments and institutions forming part of it," which in my view included its affiliated branches.

So much for the Soviet legislation as we now know it. It must be borne in mind, however, that from about the middle of 1918 till some time in 1921 there was no postal or telegraphic communication with Russia, and in the first half of 1918 communication was very dilatory. The London branch of the old private Bank was therefore placed in a very difficult position, and owing to the fact that a number of relevant documents were not produced and that Mr. Jones when examined was exceedingly reticent as to what had happened, the judge below knew very little of what had in fact happened. We have required further search to be made and a number of very relevant documents have been produced. Mr. Jones was not examined again and we have not the advantage of his explanation of the documents or of hearing what he knew from his interviews with ex-officials of the Bank who escaped from Russia. We now know from the evidence that the day after the decree of December 14 the Government put commissaries in every private bank in the territory under their power, who controlled every act of the bank. A telegram received February 6, 1918, from one Goldman, an official of the private Bank, stated that the Bank was still closed and there had been no banking transaction since December 15. Boards were placed on all private banks describing them as branches of the People's Bank, by which name the old State Bank was now known. At first one or two letters came through from Russia to "our branch, London," in the name of the "Russian Commercial & Industrial Bank," described however as "Special Account of

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the State Bank, No. 44." Mr. Jones wrote several banking letters to the head office under its old name on which the officials in Russia seem to have acted. A letter from Mr. Jones dated February 28, 1918, to Mr. Goldman shows how completely in the dark he was as to the situation. A telegram received on February 6 stated that M. Baharianz was coming from Mr. Goldman, and the letter of March 28 (1) shows that he had arrived bearing instructions from Mr. Goldman to Mr. Jones to act as if the branch were an independent institution, which he proposed to do. He adds: "I suppose it is useless for me to ask what is the position of the bank for probably no one in the world can know what its position is." After April 1 letters began to be received from the "Foreign Section of the IV. Branch of the Popular Bank of the Republic of Russia, formerly the Russian Commercial & Industrial Bank," describing the London branch as the "London Section of the IV. Branch of the Popular Bank," and Mr. Jones acted on those letters. After a time the Russian letters are signed by the liquidating committee and the Commissary. No letters or telegrams seem to have got through after about August, 1918, till some date in 1921. I am quite satisfied that from the end of March, 1918, Mr. Jones was carrying on an independent institution as instructed and had not the slightest intention of acting as agent of or obeying the instructions of the People's Bank and their Commissary in any material matter. Some persons claiming to be directors who had been in South Russia arrived in Paris and claimed to be the Board of the Russian Bank. The officials of the London branch declined to recognize this Board or indeed anybody except themselves. The legal effect of this I consider later.

The remaining facts are as follows. Until December, 1918, the London Bank continued handing the coupons of the bonds to the London branch in accordance with the instructions of the French Bank; but on December 16, 1918, the French Bank wrote to the London Bank expressing the hope that in view of the events of March, 1917, the Russian

(1) Ante, p. 638.

Revolution, the London Bank were no longer handing the coupons to the Russian Bank in London, and claimed from the Russian Bank in London the coupons against interest due on the loan. The state of the exchange favoured the payment off of a debt due in marks, and the London branch endeavoured through the Paris branch of the Russian Bank to arrange for this, asking by a letter on April 15, 1919, for an account of "the Head Office's indebtedness." After discussion an arrangement was come to expressed by the French Bank in a letter of September 15, 1919, by which the French Bank offered that, if the Paris branch of the Russian Bank would pay 1,090,000 marks to the account of the French Bank at Mayence, the French Bank would instruct the London Bank to hold at the disposal of the London branch of the Russian Bank the bonds in question. The French Bank then made an attempt to get a better rate of exchange for marks, which failed. The marks were paid to Mayence and received by the French Bank on September 27 and October 15, 1919, but the latter gave no instructions to the London Bank to surrender the bonds. They did not do so, as appears by a letter of October 1, 1919, because the question was raised in Paris whether the receipt of the branch office in London would be any answer to a claim by the head office in St. Petersburg. They had given instructions that coupons on the bonds should be paid to the London branch of the Russian Bank. The September coupons were so paid on December 5 and 8, 1919, but for some odd reason earlier coupons were not. On December 17, 1919, the French Bank required a "regular release" from the head office of the Russian Bank and a decision of the Courts before they would release the bonds. The writ in this action was accordingly issued.

From a business point of view it is impossible to regard the action of the French Bank as satisfactory in receiving money from the persons now trading in the name of the Russian Bank, but declining to give them the bonds for which the money was paid, and I do not regard a belated offer to repay the money, when the value of marks has fallen heavily,

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or to hold the bonds to the order of the Court, as any satisfactory business position. But the French Bank take the view that they can only hand the bonds to persons who can give them a receipt binding the Russian Bank, and that any person who has paid them money for a consideration that has failed can recover it back from them, and it is therefore necessary to consider whether in law the persons now using the name of the Russian Bank can give a good receipt for the bonds on behalf of the Russian Bank, or whether the French Bank is estopped from denying that they can.

The course of the trial was as follows: the defendants were allowed to amend in order to put in issue the effect of the Russian Soviet legislation, and the authority of Mr. Jones to use the name of the Russian Bank as plaintiffs. In April, 1921, His Majesty's Government had recognized the Soviet Government as the de facto Government of Russia coming into power on December 13, 1917, and this Court in *Luther's Case* (1) had held that they were bound by that recognition to recognize the Soviet legislation as valid. We were told that an appeal to the House of Lords against that decision had been abandoned. We are therefore bound to treat the Soviet legislation as valid, subject to the question of its effect.

The plaintiffs at the trial first objected that the point that there was no authority to bring the action was not matter of def nce, but only of motion to strike out the action, on the authority of *Richmond* v. *Branson*. (2) But the same point was also taken in the *Daimler Case* (3) and decided by the Court of Appeal in accordance with *Richmond* v. *Branson*. (2) Their decision on this point was reversed by the House of Lords. Lord Parker, giving the judgment of four members of the Court, says (4): "The Court having notice of the fact should have refused relief. . . . . When the Court in the course of an action becomes aware that the plaintiff is incapable of giving any retainer at all, it ought not to allow the action to proceed." If therefore the judge was satisfied either that the plaintiff company was extinct, or that its name was

(1) [1921] 3 K. B. 532.
(2) [1914] 1 Ch. 968.
(3) [1915] 1 K. B. 893, 913.
(4) [1916] 2 A. C. 337.

used without its authority, he was right in treating the action as a nullity. The objection that he could only do that in a particular way, on motion to strike out, is technical in the extreme, and in view of the decision of the House of Lords I think erroneous. By some slip however the learned judge treated the action as an effective one in which he could give judgment and award some costs to each side. I do not know to what plaintiff he gave costs, or against what plaintiff. This part of the order is clearly erroneous. On the judge's findings, following the *Daimler Case* (1), he should have struck out the action making no order as to costs.

The learned judge does not decide whether the Russian Bank is extinct and dissolved by the Soviet legislation, or still survives in a much changed form. He takes the view that one or the other has happened, and that in either case the power of attorney is invalid. It is common ground that if the Russian Bank is really extinct, the power of attorney has lapsed, but the plaintiffs dispute that, if the Russian Bank still survives, there is such a change of circumstances as terminates the power of attorney. Now the power of attorney purports to be given by the directors of the Russian Bank to carry on the business of the Bank in accordance with the orders of the board and the provisions of the articles of association. The board of directors has been abolished, and the council; the shares are annulled and there are no shareholders in Russia; no business can be carried on in accordance with the provisions of the articles of association, for the governing bodies therein contemplated have been destroyed. It seems to me that the learned judge was quite justified in holding that there was such a complete change of circumstances that a power of attorney given by the board of directors under the old circumstances no longer survived. If Mr. Jones and his fellow officials had in December, 1917, contracts of service for terms of years with the Russian Bank, I think it would have been impossible to enforce those contracts against the servants in 1918, the entity of the master having at any rate completely changed. The learned judge had not before

(1) [1916] 2 A. C. 307, 337.

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him the decree of January 19, 1920, abolishing the People's (State) Bank, and did not consider its effect. I have carefully considered the evidence as to the effect of this and the preceding decrees and orders and have come to the conclusion that at the date when the writ was issued there was no juridical person in Russia known as the Russian Commercial and Industrial Bank, either because that Bank had been entirely destroyed by the Russian decrees of 1918, or because it had lost its identity by being merged in or amalgamated with the State (otherwise the People's) Bank, which latter bank was itself extinguished by the last decree. If this is the result in law and fact, of course the power of attorney to Mr. Jones had ceased to exist when the writ was issued, the grantor of the power having ceased to exist, and the writ was therefore a nullity.

I do not disagree however with the view of the judge below that, without deciding whether the juridical person of the Bank was dead, the change of circumstances was such that the power had ceased to be valid. Whatever might be the position if Mr. Jones had issued a writ in the early months of 1918, I am quite satisfied that by the end of 1918, with pretty full knowledge of the claim of the Soviet Government that his Bank was merged in the People's Bank, he was not recognizing them, but was carrying on as an independent institution, and it is not possible for him after three years of this independent existence to say that he had still a valid power of attorney from those controlling the Bank in Russia.

It was next argued that even if Mr. Jones had no longer authority to use the name of the Russian Bank, his power of attorney having expired, yet the action of the French Bank in making an agreement with him to restore the bonds on the payment of money, and receiving money from him under the agreement, estopped them from proving that Mr. Jones had in fact no authority to use the name of the Russian Bank or to give a valid receipt for the bonds. Now in my view if there is any estoppel, it is on Mr. Jones, and not on the French Bank. On April 15, 1919, he claims an account of indebtedness of the Russian Bank, and the return of the

securities on payment. He claims it in the name of the Russian Bank. By doing so he both expressly and impliedly represents that he has authority to act in the name of the Russian Bank. The French Bank acting on his representation make an agreement with the Russian Bank and receive money from some one purporting to be the Russian Bank. As this action of theirs was directly induced by the representation of Mr. Jones that he had authority to act for the Russian Bank, I am unable to see how Mr. Jones can successfully contend that their action estops them from saying that he had not authority to represent the Russian Bank or to give a good receipt in their name if he had in fact no such authority. Any action of theirs based on the assumption that he had authority was caused by his untrue representation that he had such authority. Estoppel is not a cause of action, but a rule of evidence by which A.'s statements or conduct to B. alleging one state of circumstances, if relied on and acted on by B. prevent A. from proving against B. the truth—namely, that the state of circumstances alleged does not exist. But if A.'s original allegation is caused by B.'s misrepresentation of the state of circumstances, B. cannot take advantage of an allegation based on his own misrepresentation. In my view, Mr. Jones cannot rely upon any estoppel in this case, while he may have a cause of action against the French Bank for the return of money paid. They are not both approbating and reprobating the same transaction. They are either approbating a transaction with the Russian Bank, but requiring the Russian Bank to give them a valid receipt for the bonds, which Mr. Jones cannot do, or they are reprobating the transaction with Mr. Jones and offering to return the money, while they keep the bonds which are the property of the Russian Bank until the Russian Bank pays for and claims them.

The view I have taken as to the effect of the decree of January 19, 1920, appears also to destroy any possible validity of a suggested ratification of the issue of the writ by an English provisional liquidator on May 11, 1922, some weeks after Sankey J. had held there was no authority to issue it.

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If there was no such juridical person as the alleged plaintiff when the writ was issued, no one claiming to be that person at a later date could ratify the earlier action. It is elementary that a company cannot ratify an agreement purporting to be made on its behalf before its formation. Whether a Russian company is dissolved depends on Russian law, the law of the country of its formation, not on English law, whose Courts and law cannot create or dissolve a Russian legal entity. Under any circumstances I should have desired to consider very carefully whether it was possible to ratify the issue of a writ after a Court had held its issue a nullity.

The above conclusions also render it unnecessary to discuss the proceedings in the English winding up. I only desire to say that these may require very careful consideration at some subsequent stage, and that it is desirable that all concerned, including, with respect, the Official Receiver and the winding-up judges, should give the matter more careful consideration than they have at present done. I think it very doubtful whether the effect of the Russian legislation was not that if at the time of the winding up orders there was a company at all, it was an unregistered company with less than seven shareholders, which the English Court had no jurisdiction to wind up. There is some doubt also whether the English Courts are not dealing adversely with the property of a foreign sovereign State, a proceeding which appears to be beyond their jurisdiction. A Russian company is an entity depending on Russian law, which cannot be dissolved by an English Court, and whose shareholders depend for their existence on Russian law only. While, if a foreign company carries on business within the English jurisdiction, an English Court can deal with its business assets and creditors within the jurisdiction, I do not know that their powers over and duties to shareholders, creditors and assets without the jurisdiction have ever been satisfactorily considered, and I say no more than that some of the orders reported to us in this case seem to require careful consideration. It is not necessary to decide anything in this case, but nothing in my judgment must be taken as

approving the validity of the present winding-up orders and proceedings.

In my view, therefore, Sankey J. should have struck out the action as brought without authority. He had, therefore, no jurisdiction to give costs against either party; no application was made to him to make any other order as to costs. I should affirm his judgment on the ground that when the writ was issued there was no existing company on whose behalf it could be issued; and secondarily that if there were such a company, the change of circumstances had determined the power of attorney. There being no existing company at the time of the writ, no ratification after judgment of a writ purporting to be issued in its name was possible.

ATKIN L.J. The facts in this case are as follows. The Russian Commercial and Industrial Bank, whom I will call the plaintiff Bank, was incorporated in Russia in or about 1889 in accordance with Russian law as a joint stock banking company. In 1914 its head office was at Petrograd and it had branches in Paris, London and elsewhere. In 1914 the plaintiff Bank arranged with the Comptoir d'Escompte de Mulhouse an acceptance credit of 800,000 marks to be secured by a deposit by the London branch of the plaintiff Bank with the London County and Westminster Bank of sterling bonds 29,000*l.* 5 per cent. Chinese Loan and 29,000*l.* 4 per cent. Brazil Loan, which bonds are the subject matter of this action. The negotiations for the transaction were conducted by the Paris branch of the plaintiff Bank. The Comptoir d'Escompte de Mulhouse appears at that time, and all other material times, to have been controlled by the Banque Nationale de Crédit, a Paris bank, and to that institution, though not a formal party to the present proceedings, the credit of the successful defence to this action is due. The transaction was duly completed. The bonds were deposited by the London branch of the plaintiff Bank with the London County and Westminster Bank for the account of the Banque Nationale de Crédit, and drafts to the full amount of the credit were accepted by the Comptoir d'Escompte de

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Mulhouse by February, 1914. They were afterwards renewed and later in 1914 taken up by the acceptors. In accordance with the terms of the original arrangement the coupons of the bonds, as they were about to become due from time to time, were handed by the London County and Westminster Bank to the London branch of the plaintiff Bank, who had provided the bonds. On November 20, 1914, Mr. V. C. B. Jones was appointed by the board of the plaintiff Bank the acting manager pro tempore in London of the plaintiff Bank and was granted a power of attorney of that date to exercise the powers therein mentioned. From that time he has conducted the business of the branch of the plaintiff Bank in London without interruption until the date of the appointment of a receiver and manager on a winding-up petition in the spring of 1922. In November, 1917, occurred the revolution in Russia, and in December, 1917, and January, 1918, the Soviet Government made certain decrees affecting banks and banking which must be examined later. The branch in London continued its business as before, and throughout 1918 received, as before, the interest coupons upon the bonds in question. On January 2, 1919, the Banque Nationale de Crédit addressed to the London branch of the plaintiff Bank a letter complaining that the latter had "kept on claiming" the coupons of the bonds. The complaint was quite unjustified, but it was passed on to the London branch by the Paris branch of the plaintiff Bank with a request to look into it in view of their friendly relations with the Banque Nationale de Crédit. On January 3, 1919, the Banque Nationale de Crédit instructed the London County and Westminster Bank no longer to deliver the coupons to the plaintiff Bank. As a result the London branch, after obtaining the then necessary permission from the Treasury, proceeded to take steps to pay off the loan and wrote to the Comptoir d'Escompte de Mulhouse the letter of April 15, 1919. [The Lord Justice read the letter set out ante, p. 633, and proceeded:] It may be noted that the letter speaks of the "total amount of our head office's indebtedness to you," "the control of our securities," and is signed "Russian

Commercial and Industrial Bank. V. C. B. JONES." Negotiations followed. The Mulhouse Bank at first asked that payment should be made to the Deutsche Bank at Berlin. This was refused by the London branch, who wrote on May 27: "If you will instruct the Banque Nationale de Crédit to arrange the matter on your behalf we will likewise instruct our branch in Paris to act on our behalf and so to settle the matter on a friendly basis." On August 9 the London branch informed the Comptoir d'Escompte de Mulhouse that they had authorized "M. Georges Guyot, the sub-manager of our Paris office, to come to a decision" on the matter, and on September 8, as M. Guyot was unable to attend, they substituted M. Maurice Montebrun, "the attorney of our Paris office," to take his place, On September 15, 1919, M. Montebrun came to a definite agreement with the Mulhouse Bank, which was confirmed in writing by the letter of that date of the Mulhouse Bank to the Paris branch which has been already referred to. On September 17 the Mulhouse Bank, who, as appears from the letter of September 15, had agreed to hand over the bonds on receiving a provisional payment of 1,090,000 marks, sought to reopen the matter on the footing of receiving francs and not marks, but this ingenious suggestion was not adopted and was eventually dropped. Meanwhile on September 18 the London branch of the plaintiff Bank had instructed the Banque Nationale de Crédit, Mayence, to pay to the Mulhouse Bank on September 22, the agreed date, the sum of 1,090,000 marks. This sum was received by the Mayence Bank and duly paid in accordance with instructions. Nevertheless the London County and Westminster Bank received no instructions from the French Bank to hand over the bonds. Urgent remonstrances were addressed by both London and Paris branches to the Mulhouse Bank and to the Banque Nationale de Crédit. The latter at first took the line of having to consult the Mulhouse Bank, but eventually the explanation came from M. Raval, the President of the Administrative Council of the Banque Nationale de Crédit, reported in the letter from the Paris branch to the London branch of October 1, 1919. I do

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not stay to examine this explanation. The objection was not removed by any representation from the London or Paris branches of the Bank, and in view of some of the contentions put forward at the trial it is noteworthy that both in the inception of the transaction in 1914, and in the arrangements for completing it in 1919, both the London and Paris branches were acting in complete accord, and that it was in fact the Paris branch that negotiated the actual bargain in both years. A suggestion that Mr. Jones was acting for his own account, or for his friends, or for London creditors, or in some way otherwise than for the general interests of the Bank as a whole, seems to be unfounded. I see no ground for attacking Mr. Jones' conduct in any respect. Meantime the Banque Nationale de Crédit who through the Mulhouse Bank had been credited with the coupon due on September 1, 1919, on the Chinese Bonds for 725*l.*, repaid that sum through the London County and Westminster Bank to the London branch of the plaintiff Bank. Their scruples in respect of the interest on the bonds did not extend to the 1,090,000 marks received in payment of the loan. I think that there can be no doubt that at this time they recognized that they had no right to the bonds or coupons. On January 19 the Mulhouse Bank, on hearing from the London County and Westminster Bank that they were being threatened with legal proceedings, wrote to that bank that they could not authorize delivery to the London branch as the deposit was originally made for account of the head office in Petrograd. On January 23, 1920, the writ in this action was issued.

At the trial in June, 1921, the defendants were allowed to amend their defence by adding a plea, amongst others, that by two decrees of the Soviet Government, dated December 28, 1917, and February 9, 1918, and an Order of April 12, 1918, the corporation had ceased to exist. This amendment doubtless was due to the fact that on May 26, 1921, for the first time His Majesty's Government, by the Secretary of State for Foreign Affairs, announced their recognition of the Soviet Republic. This raises a question of primary importance. If determined in favour of the

defendants it necessarily disposes of the plaintiffs' case, for obviously a non-existent person cannot sue. But the effect is not confined to this particular case. The effect of recognition may be assumed to be retrospective, but until recognition the Soviet decrees would have been inoperative, and since 1917 the Bank had been carrying on business in London through its branch, disposing of assets, acquiring new assets, and incurring liabilities as a legal person in the fullest sense recognized by our law. The result of holding that it was, in fact, dissolved in January, 1918, is to make it impossible to enforce any of its rights or liabilities, and to leave in considerable peril all those who in the course of banking business in the City of London have in any way, at any time after 1917, taken any part in disposing of, or handling its assets; for obviously a non-existent person can give no title to anything. Without departing from principle one may, I think, require the fact that the Russian law has had this effect to be strictly and clearly proved. The evidence at the trial on this point was given by Russian lawyers on either side, who produced translations of the decrees relied on. At a late stage of the hearing before us reference was made to a further decree of January, 1920, and an adjournment was made that evidence might be given as to the effect of this decree, though no further amendment was asked for. The substance of the defendants' evidence was that the two decrees of December 17, 1917, and January 26, 1918, had dissolved the plaintiff corporation. The evidence of the plaintiffs was that according to Russian law dissolution could only be effected by express statutory provision, and that the two decrees had not the effect of dissolution, and though the Government acquired the business and assets of the Bank, and took over the administration, and annulled the rights of shareholders, the legal entity still subsisted, and was therefore capable of being an actor in a suit.

I do not propose to discuss the evidence and arguments at length. The matter seems to be one essentially for persons versed in Russian law, in respect of which well qualified witnesses were called on both sides. The learned judge,

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who did not decide the point but saw the witnesses, expresses himself as particularly impressed by the evidence given by Dr. Idelson, who was a Member of the Council of the Ministry of Finance, and held the chair of banking in the Imperial Peter the Great Polytechnic from 1906 to 1918. I am equally impressed on reading the evidence, and if the question turned upon the evidence of experts alone, I should come to the conclusion that the defendants had not proved their case. We are quite familiar in our law with the position that a company may lose all its assets, may have no directors administering the affairs of the company, or have the powers of the directors transferred in the course of liquidation to an officer of the Court, may have all its assets distributed amongst the shareholders, and yet remain a legal entity until a formal dissolution: see the Companies Consolidation Act, 1908, ss. 175 and 195. But if there were a doubt on the construction of the decrees themselves of December, 1917, and January, 1918, the problem appears to me to be solved when one looks to the circumstances at the time of the decrees, the subsequent acts of the Government both by orders and dealings with the branch in question. The Russian banks in 1917 had and continued to have branches elsewhere than in the territory in fact controlled by the Soviet Government. Not only were there branches in parts of Russia over which the Soviet Government only gradually assumed power, but there were branches in various financial centres such as Paris, London, and elsewhere. Moreover banking business involves the creation and performance of obligations extending over periods of time, to secure the benefit of which it is for business purposes essential that the contracting party should continue to exist without a diminution of credit. The Soviet Government were fully aware of these facts, and it appears to me probable that they would keep alive the banks, though taking them and their assets into complete State control, rather than at one blow destroy them and all assets depending on what we call rights of action. In any case the evidence shows that this is what they did. The administration of the old banks continued till April, 1918, and was then

transferred to the State Bank. The branches of the old bank continued though under the new style of a branch of the State Bank, a position very familiar as the result of bank amalgamations in this country, though entirely consistent with the continued existence of the old bank. Cheques were honoured addressed to the old bank. The order or decree of December 10, 1918, seems to me to be only consistent with a recognition of the actual existence of the Russian Banks up to that moment. By s. 3 it is provided: "All private commercial banks with their branches, agencies and commission agencies are subject to nationalization. The nationalization of private banks is carried out locally, under the close supervision of special technical liquidation collegiums." There follow provisions, s. 5, for amalgamating "two or several affiliated branches of private banks into one or several branches in accordance with local requirements." By s. 6: "December 14, 1917, must be considered as the initial date to which must be referred the liquidation of former private banks. Therefore irrespectively of the day when the nationalization actually takes place, all the establishments of the People's Bank reorganized from former private banks and operating at present, as well as those which are to be reorganized, must consider their work from the said date as being carried on for the account of the State—i.e., for the account of the People's Bank." By s. 7: "All establishments of the former private banks, as well those which are being liquidated entirely as those which are being amalgamated between themselves, must make up the liquidation balance sheet on December 14, 1917." There are other provisions which I need not detail, but I confess myself totally incapable of reconciling these provisions with the contention that a year before the Government had dissolved the banks, so that neither they nor any branch had thereafter any legal existence. But the matter does not rest on decrees or orders. During the course of 1918, long after the alleged dissolution of the bank, the London branch was communicating in its corporate name with the head office at Petrograd, and receiving communications from Petrograd, each honouring

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orders addressed by the one to the other. It is true that the Petrograd branch signs "Formerly the Russian Commercial and Industrial Bank, Liquidating Committee" or describes itself as a branch of the State Bank, and sometimes but not always describes the London branch as a branch of the State Bank; but there is no suggestion of any lack of continuity, the old name is retained in formal documents, while in communications from Moscow the Moscow Commissary addresses himself to the Russian Commercial and Industrial Bank. A few instances will suffice. On January 22, 1918, there is a telegram addressed to the Banque Russe Commerce Industrie of Petrograd "Pay Julia Pavlovna Kostomaroff Vasilievsky Vostrow 6 linia 49 Kvartira 14 One thousand eighty roubles behalf Kostomaroff. Cable E Berg Karangosowskaia 3 lodgment Odessa seven hundred twenty roubles behalf Beresowsky," signed Jones Froese. Those are the two persons entitled to sign on behalf of the bank. Again the Petrograd branch write, in a letter addressed "Petrograd, July 16, 1918. Formerly Russian Commercial and Industrial Bank. Telegraphic address, in Russia, Petropari, in London, Lonpetro. Current account with the State Bank No. 44.—Dear Sirs, In accordance with your telegram of January 22, saying: 'Pay Julia Pavlovna Kostomaroff Vassilievsky Vostrow 6 linia 49 kvartira 14 one thousand and eighty roubles behalf Kostomaroff. Cable E Berg Karangosowskaia 3 lodgment Oddessa [*sic*] seven hundred twenty roubles behalf Beresowsky' and of February 11, saying: 'Pay Julia Pavlovna Kostomaroff Vassilievsky Vostrow 6 linia 49 kvartira 14 eight hundred eighty-seven roubles 50 kopeks behalf Kostomaroff. Cable Rochlia care Gertz Averbuch Kremenetz Volynskoi gouberniii one hundred roubles behalf Kortsky,' We have paid to Julia Kostomaroff—Rbs. 1.967.50 (one thousand nine hundred sixty-seven roubles, 50 kopeks) as per her receipts herewith enclosed, the said amount having been brought to the debit of your account with us, value May 24 a.c. As regards the payments of Rbs. 720 to Mr. Berg, Odessa, and Rbs. 100 to Mr. Rochlia, Kremenetz, they could not be effected because of the forced occupation of Odessa

and Kremenetz. We remain, Dear Sirs, Yours truly, Formerly the Russian Commercial and Industrial Bank, Liquidating Committee," and then it is signed by the Committee. Now the receipts enclosed are as follows: "Russian Commercial and Industrial Bank at Petrograd. Received of the Russian Commercial and Industrial Bank by order of their London Branch and for account of Mr. Kostomaroff—one thousand and eighty Roubles. Receipt in duplicate. Petrograd, May 24, 1918. Rs. 1080. Signed J. KOSTOMAROFF." And there is a document in similar form of the same date as to the balance of 887 roubles, 50 kopeks. Those documents indicate that in May of that year the Petrograd office by order of the London branch was issuing receipts in the name of this very Russian Commercial and Industrial Bank, which at that time is said to have been extinct. On July 16, 1918, the Petrograd office write in precisely the same way a letter addressed to "Our branch, London" with the same heading as before: "Dear Sirs, Herewith we beg to inform you that although we had no new instructions from you, we have paid Mrs. Catherine Gardner, 13 Tverskaja:—Rbs. 500—(five hundred roubles) and request you to credit us this amount under advice, value May 11 a.c. Will you kindly inform us whether you can give us instructions once for all regarding this monthly payment of Rbs. 500 to the said client, or we have to await your instructions for every payment separately. In the meantime we will suspend this payment until your reply." That is signed in the same way as before. Then on July 19 the Petrograd office again write to "Our Branch, London," "Dear Sirs, Herewith we beg to enquire whether you have executed Messrs. 'The Ocean' Share Company's, Petrograd, order to transfer their deposits from their current account at our London Branch to Mr. Eduard Sheperd's account at the Lloyd's Bank, 72, Lombard Street, London. Awaiting your prompt reply, we remain, Dear Sirs, Yours truly, Formerly the Russian Commercial and Industrial Bank, Liquidating Committee." This letter is again signed by a Commissary. And finally the answer to that letter is a letter from "The

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Russian Commercial and Industrial Bank, Lombard Street, Telegrams Lonpetro London," addressed to "Our Head Office, Petrograd—Dear Sirs, we wired you yesterday as follows :—'Reference our letter fifth April we confirm regularity instructions pay Katherine Gardner three hundred roubles monthly,' which we herewith confirm, Yours Faithfully," signed W. C. B. Jones and C. Froese. There is only one other document that I need refer to. That is a communication from Moscow in the name of the Banque Russe au Commerce et de l'Industrie, Moscow branch, making mention of a capital of 35,000,000 roubles fully paid, and of an account at the State Bank. It gives a telegraphic address "Petropari," and it is dated April 11, 1918, and addressed to the Russian Commercial and Industrial Bank, London. It is in these words : "Dear Sirs, In accordance with the request contained in your telegram of December 21, 1917, we have paid to Mr. Alexander Dmitrieff of our city, as per enclosed receipt : R. 941.20 (nine hundred and forty-one roubles and twenty kopecks) value March 21, 1918, (new style), which amount has been placed to your debit. We are, dear Sirs, Yours faithfully, The People's Bank of the Russian Republic late the Russian Commercial & Industrial Bank, Moscow Branch, signed H. KIRSTION," who was one of the Commissaries.

After the late summer of 1918 communications with Russia practically ceased, but that the official view of the continued existence of Russian banks remained what I have stated is reasonably clear from two drafts put in evidence during the last adjournment, and addressed to the London branch of another Russian bank, the Russo-Asiatic Bank, by a Mutual Credit Society of Petrograd, which itself, by the way, was the subject of similar legislation to that affecting the banks. That draft is dated November 11, 1922, and is drawn in Petrograd. It is addressed to the Russo-Asiatic Bank, 64, Old Broad Street, London, in these terms:—"Dear Sirs, I request you kindly to hold at the disposal of the Petrograd Society of Mutual Credit, the sum of 300 (Three hundred) Pounds Sterling at debit of my current account with you.

Yours faithfully, TCHATCHKOFF." The signature of Tchatchkoff is certified by the Crédit Mutuel de Petrograd. Petrograd Society of Mutual Credit. It is indorsed: "Pay to the order of the State Bank, North West District Branch, Petrograd, value in account. Crédit Mutuel de Petrograd. Petrograd Society of Mutual Credit," and is further indorsed: "Pay to the Order of the Russian Trade Delegation in England, London, value in account. Petrograd, November 16, 1922. State Bank, North West District Branch." Therefore that draft drawn in Petrograd on November 11, 1922, addressed to the Russo-Asiatic Bank, when that bank, according to the view put forward by the defendants in this case, was dead, and had been dead for five years, is indorsed by several banking institutions, in Russia, and eventually comes into the possession, of all people, of the Russian Trade Delegation in England, and they apparently get payment of it in the ordinary course. Certainly if the Soviet Government killed the Russian bank in January, 1918, they are imputing remarkable activities to the corpse. It may be noticed that in the case of the Russo-Asiatic Bank neither the Board of Trade nor the bank itself seems to have been aware that it was dead, for on December 18, 1922, Russell J. gave judgment against the bank in an action of the *Dresdner Bank* v. *Russo-Asiatic Bank* (1) in an action brought by the authority of the Controller under an order made in respect of the Dresdner Bank under the Trading with the Enemy Amendment Act, 1916. Apparently the banks are dead to their debtors but not to their creditors.

Pressed by some of the above facts the defendants appeared inclined during the argument to fall back upon the later decree of 1920 abolishing the State Bank and transferring its functions to a State Department. Either the Bank was destroyed in 1918 it is said, or being amalgamated with the State Bank, that institution was destroyed in 1920 and nothing further remains. This involves throwing over their pleading and their witnesses who pledged themselves to the destruction at the latest by the decree of January 26, 1918. Moreover

(1) [1923] 1 Ch. 209; 92 L. J. (Ch.) 204.

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it does not appear to assist the argument. A bank cannot at the same time be dead and not dead, and if not dead in the months of 1918, it remained alive, and had an existence independent of the State Bank, and the termination of the State Bank appears to have no particular effect on the private bank. The control of the business which had been confiscated might as well be in the hands of a State department as of a State corporation, and might so continue consistently with the existence of the Bank as a juridical person.

For the above reasons I have come to the conclusion that the defendants have not established their plea that the plaintiff corporation no longer exists. I venture to think that their witnesses have assumed too readily that nationalization involves extinction, and have not given sufficient weight to the consideration that a business may be nationalized or amalgamated without the persons who owned the business being extinguished.

Having come to the conclusion that the plaintiff Bank still remains a juridical person capable of maintaining suit in this country, I can deal with the remaining questions more shortly. The point upon which the learned judge decided the case was that the manager of the London branch, Mr. Jones, had no authority on behalf of the bank to bring the present action. The authority of the agent is to be determined by the law of the country where the agency is created, in this case Russia ; and it would probably be sufficient to rely upon the statement of Mr. Krougliakoff, the expert lawyer called by the defendants, that if the old Bank had still been in existence, Mr. Jones' power of attorney would be still valid. But there appear to be two answers to the defendants' contention. The power of attorney is an authority given by the Bank as a legal person, and it in terms validates on behalf of the Bank whatsoever may be legally done between the date of revocation by any means of these presents and the time when the revocation becomes known to the Acting Manager pro tempore. The alleged revocation is the change in the administration of the company from the directors to the State Bank, or the Soviet Government, and I am not disposed to

dispute the view that without express provision such a change might operate to discharge the servants of the company, and so revoke the authority of the manager. But such a revocation is within the express terms of the power of attorney and cannot be said to have come to the knowledge of the manager until the date in May, 1921, when this Government, for the first time, recognized the Soviet Government, a date long after the inception of the action. In the second place, even if the authority had been revoked, it appears to me plain that it was renewed by the new authority responsible for the administration of the affairs of the Bank. That the Soviet Government knew that there was a London branch is obvious, that they knew that it was continuing to carry on business in the name of the Russian Bank is established by the correspondence to some of which I have already referred, and also by the fact that they intended it to carry on business. Indeed without this correspondence I should have drawn that inference from the knowledge of the existence of the branch and the knowledge of the nature of banking business. They reply to letters written by Mr. Jones on behalf of the Bank and accept his business directions. They must be deemed to have intended that some one should carry on the business of the Bank in this country, and in the ordinary case of a private principal I cannot conceive of any one refusing to draw the inference that authority was impliedly given to the former manager to carry on as before with the former authority. Such an inference under the circumstances would, in my judgment, be a matter of course if we were dealing with an official liquidator or receiver and manager in Russia permitting a branch to be continued here, and I refuse to draw a different inference merely because we are dealing with a foreign Government.

I desire to add that even if there were a question of defective authority to sue, in my judgment it was not open to the defendants to raise the point as a matter of defence. The judgment of Warrington J. in the case of *Richmond* v. *Branson* (1) appears to me to state the law in a matter

(1) [1914] 1 Ch. 968, 974.

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of this kind, where the question is whether the action has been brought with the authority of an existing principal, himself capable of suing. In that case the learned judge says: "But the real question is the authority of the solicitor. Is that a question which can be raised as a relevant issue in the action and at the trial? No authority has been cited in support of the affirmative of such a proposition, and, in my opinion, it is impossible, according to the ordinary practice and procedure of the Court, to justify that proposition. The business of this Court could not be carried on if one were not entitled to assume the authority of the solicitor unless and until that authority has been disputed and shewn not to exist in the proper form of proceeding, namely, a substantive application on the part of the parties concerned to stay the proceedings on the ground of want of authority." The *Daimler Case* (1) does not appear to be inconsistent with this view. That was a case where no retainer could be given at all, and in such a case the Court may very well refuse to hear the action on being informed of the facts. This appears to be the ground of the decision in the joint opinion of Lord Parker and Lord Sumner. They say (2): "When the Court in the course of an action becomes aware that the plaintiff is incapable of giving any retainer at all, it ought not to allow the action to proceed. It clearly would not do so in the case of an infant plaintiff, and I can see no difference in principle between the case of an infant and the case of a company which has no directors or other officers capable of giving instructions for the institution of legal proceedings." There the only persons controlling the company were personally incapacitated from giving instructions to sue because they were alien enemies. Here the position is entirely different; the administration is ex hypothesi in the hands of a friendly government, who could undoubtedly direct an action to be commenced in the name of the existing Bank. They are in the position of ordinary principals, and I have never heard of any plea having been formulated which would entitle the defendant to raise at the hearing a defence that, though

(1) [1916] 2 A. C. 307. (2) [1916] 2 A. C. 337.

the plaintiff had the right to sue, he had not in fact authorized the particular action. If it were a valid plea, one would expect to find some trace of it in the books during the last 500 years.

As to the suggestion emanating originally from the French Bank that this was a head office transaction, and therefore one that should not be put in suit on instructions from London, the answer appears to be that the plaintiffs are the same corporation in London or in Russia or in Paris. The point is really one of authority to sue, with which I have already dealt. But it may be added that the sterling bonds which were redeemed by the agreement had originally come from the custody of the London branch, and it appears to me to be well within the authority of the London manager to take steps to redeem such bonds when the occasion was a profitable one, both for the Bank as a whole and, so far as there was any separation of business interests, for the branch. But in any case the French Bank, having knowingly received money from the London branch (which, by the way, it still retains), and having promised to return the bonds to that branch, cannot thereafter dispute the authority of the London branch to complete the transaction. It will receive a complete discharge if it returns the bonds on the order of a Court of competent jurisdiction. Akin to this last contention was the suggestion that the bonds now belong to the Soviet Government. It is possible that they do ; to determine whether they do or not, it would be necessary to consider how far the Soviet legislation has extra-territorial operation in respect of movables, a matter which, in my judgment, it is unnecessary to consider. I think it plain that the French Bank, having received the bonds from the Russian Bank, is estopped from raising the jus tertii unless it acts on behalf and with the authority of the third person whose right of property it sets up: *Rogers* v. *Lambert*. (1) This it is not suggested that the French Bank can or desires to do.

An attempt was made by the plaintiffs to support their case, should there be found to be a want of authority, by

(1) [1891] 1 Q. B. 318.

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putting forward a ratification by the liquidator. I am not satisfied that the liquidator of a branch business of a company registered abroad and having its head and seat abroad is so clothed with the authority of the principal as to be competent to ratify an act not within the authority of the branch here, and I should not support the claim on that ground if it were otherwise unfounded.

In the result this case resolves itself into the simple position of a claim against a mortgagee who has been paid off and who holds both the security and the sum repaid.

In my opinion the defence should meet with its just reward, which is that judgment should be given for the plaintiffs for the relief claimed, with costs.

Appeal dismissed.

Solicitors for appellants: *Freshfields, Leese & Munns.*
Solicitors for respondents: *Donald McMillan & Mott.*

NOTE.

Decrees of the Russian Socialist Federal Soviet Republic referred to above.

Decree of the Nationalization of Banking:—

In the interests of the proper organization of national economic life, of the resolute eradication of banking and speculation, and of the complete liberation of the workers, peasants, and the whole labouring population from exploitation by banking capital, and also with the object of establishing a single People's Bank of the Russian Republic, a bank genuinely serving the interests of the people and the poorest classes, the Central Executive Committee hereby decrees:—

1. Banking is declared a State monopoly.

2. All existing joint stock banks and banking houses are amalgamated with the State Bank.

3. The assets and liabilities of the liquidated banks are taken over by the State Bank.

4. The method of amalgamation of joint stock banks with the State Bank shall be determined by a special decree.

5. The management of the business of joint stock banks is temporarily placed in the charge of the council of the State Bank.

6. The interests of small investors shall be fully safeguarded.

Passed at the session of the General Executive Committee on December 14 [1917].

Published in No. 35 of the Gazette of the Provisional Workers' and Peasants' Government, December 17, 1917.

Decree of the Council of People's Commissaries confiscating share capital of the former joint stock banks :—

1. The share capital (stock, reserve and special) of former joint stock banks are transferred to the State Bank of the Russian Republic on the basis of complete confiscation.

2. All bank shares are declared null and void, and payment of dividends of any kind whatsoever is unconditionally stopped.

3. All bank shares must forthwith be surrendered by the present holders to the local branches of the State Bank.

4. The holders of bank shares which they cannot produce must submit to the branches of the State Bank register records of the shares in their holding indicating their exact whereabouts.

5. The holders of bank shares who have failed to surrender them in accordance with paragraph 3 or to submit register records of their shares in accordance with paragraph 4, within a period of two weeks following the day of the publication of the present decree, are punished by confiscation of all their property.

6. All transactions and deeds of transfer referring to bank shares are unconditionally prohibited. Persons taking part in such prohibited transactions and deeds are punished with imprisonment up to three years.

Signed. Chairman of the Council of People's Commissaries,
VL. ULIANOFF (LENIN).
Principal Secretary to the Council of People's Commissaries,
VL. BONTCH-BRUIEVITCH.

Published in No. 18 of the Gazette of the Workers' and Peasants' Government, January 26, 1918.

Order of the Principal Commissariat of the People's Bank published in the Izvestia of April 12, 1918, No. 32.

The Principal Commissariat of the People's Bank informs the public that :—

1. The administration of the late private banks is abolished as from April 1, 1918, and its functions are handed over to the People's Bank of the Russian Republic.

2. Private persons must address themselves direct to the Director of the corresponding section of the People's Bank in all matters concerning late private banks.

[Sects. 3 to 6 related to "hours and days of reception at the People's Bank."]

Signed. Deputy Principal Commissary KRESTINSKY.

Constitution of Russian Socialist Federal Soviet Republic adopted by the Fifth All-Russian Congress of Soviets at the sitting of July 10, 1918 :—

Declaration of rights of the labouring and exploited people sanctioned by the Third All-Russian Congress of Soviets in January, 1918, together with the Constitution of the Soviet Republic sanctioned by the Fifth All-Russian Congress of Soviets, form[ing] one fundamental law of the Russian Socialist Federal Soviet Republic. This fundamental law comes into force from the moment of its publication in final form in the 'Izvestia of the All-Russian Central Executive Committee of Soviets.' It must be published by all local organs of the Soviet Power and exhibited in all Soviet institutions at a conspicuous place.

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The Fifth All-Russian Congress of Soviets instructs the People's Commissary for Public Instruction to introduce in all schools and educational institutions of the Russian Republic without exception the studying of the fundamental provisions of the present Constitution, as well as of their explanation and interpretation.

Division I.—Declaration of Rights of the labouring and exploited people. Chapter I.: Russia is proclaimed a Republic of Soviets of Workmen's, Soldiers' and Peasants' deputies. All power in the centre and on the spots [Qu. central and local authority] belongs to these Soviets.

Chapter II., Sect. 3.—Taking as its fundamental task to abolish all exploitation of man by man and to remove completely the division of the community into classes, to establish socialist organization of community and victory of socialism in all countries, the Third All-Russian Congress of Soviets of Workmen's, Soldiers' and Peasants' Deputies enacts:— . . . .

(*e*) The transfer of all the banks into the ownership of the Workmen-Peasants' State is hereby confirmed as one of the conditions of the liberation of the toiling masses from the yoke of capital . . . .

Resolution of the Council of the People's Commissaries dated September 20, 1918, on the undeviating enforcement of the Decree of Monopolization of Banking.

Having considered the report of the People's Commissary of Finance as to the mode of further carrying into effect the nationalization of banks, the Council of People's Commissaries has resolved:—

1. To recognize that by the decree of December 14, 1917, there is established the principle of monopolization of banking in Russia by means of nationalization (or liquidation) of all the then existing private and public credit institutions.

2. To instruct the People's Commissary of Finance to carry out urgently by administrative procedure the nationalization (or liquidation) of all still existing credit institutions.

3. To instruct the People's Commissary of Finance to submit to the Council of People's Commissaries periodical reports as to the course of nationalization of banks and as to the position of banking.

Resolution of the Council of People's Commissaries on the liquidation of foreign banks, dated December 2, 1918:—

All foreign banks operating within the confines of the Russian Socialist Federal Soviet Republic are to be liquidated. With regard to Russian joint stock banks, they come under the effect of the decree of December 14, 1917 (Collection of Enactments, 1918, No. 10, Art. 150), irrespective of the nationality of their shareholders or depositors.

Chairman of Council of People's Commissaries,
VL. ULIANOFF (LENIN).

Administration of Affairs of Council of People's Commissaries,
VL. BONTCH-BRUIEVITCH.

Published in No. 90 of Collection of Enactments (Art. 907), 1918, and in No. 226 of the Izvestia of the All-Russian Central Executive Committee, December 5, 1918.

Collection of Enactments and Orders of the Workers' and Peasants' Government No. 98 of 1918:—

Art. 997.—Instructions approved by the People's Commissary of Finance on December 10, 1918, on the method of nationalization of private banks.

1. The present instructions are issued with the object of elaborating the decree of the Council of People's Commissaries on the nationalization of private banks, dated December 14, 1917, (Collection of Enactments, 1917, No. 10, Art. 150), in pursuance of Clause 4 of the said decree.

2. Under nationalization referred to in clause 1 must be understood not only the transfer of credit institutions out of the hands of private owners into the hands of the State by means of amalgamating them with the State (People's) Bank, but also the reorganization of the activities of such institutions on new principles in accordance with the tasks imposed by the conditions of the present social order on the People's Bank of the Russian Socialist Federal Soviet Republic.

3. All private commercial banks with their branches, agencies and commission agencies are subject to nationalization.

The nationalization of private banks is carried out locally under the close supervision of special technical liquidation collegiums. These collegiums, appointed by the Chief of the financial department of the local council of Deputies by agreement with the manager of the local establishment of the former State bank, are composed of one representative from the branches of each of the former private banks, of commissaries of former private banks and of two representatives from the former State bank (one of the representatives of the State bank must necessarily be the manager of a corresponding establishment), and it is provided that in those towns where there are no establishments of the former State bank there must be commissioned for the purpose of participating in the technical liquidation collegiums the representatives of the nearest establishment of the bank and one representative of the State Control. The manager of an establishment of the former State bank acts as chairman of these collegiums. There may be invited into the collegiums, by agreement between the manager and the chief of the department of finance, other competent persons as well with the right of consulting.

Note.—Documents and correspondence in the name of the collegium are signed by three persons: by one of the personnel of the former private banks, by the manager of the former State bank and by the commissary of the former private bank.

The technical liquidation collegiums are guided in their activities by the present instructions, and on all questions relating to the matter of the nationalization of former private banks they communicate with the Central Administration of the People's Bank in Moscow, the department of local establishments.

4. The establishments of the former State bank have to be called in future the fundamental branches of the People's Bank (or offices of the People's Bank), while the branches reorganized from the former private banks must be called the affiliated branches of the People's Bank (or simply the branches, if the establishments of the former State bank will be called offices).

5. In those towns where besides the establishment of the former State bank there is only one establishment of a private bank, the latter is subject to liquidation; in the towns with two or several affiliated branches of private banks all such branches are amalgamated into one or several branches in

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accordance with local requirements. In any case, if local economic conditions call forth a necessity of opening more than one affiliated branch of the People's Bank, then the fundamental branch (office) must make an application to this effect, stating its reasons, to the Central Administration of the People's Bank.

6. December 14, 1917, must be considered as the initial date to which must be referred the liquidation of former private banks. Therefore, irrespectively of the day when the nationalization actually takes place, all the establishments of the People's Bank reorganized from former private banks and operating at present, as well as those which are to be reorganized, must consider their work from the said date as being carried on for the account of the State, i.e., for the account of the People's Bank. All operations however which are organically connected with the activities of the former private banks before December 14, 1917, must not be included in the accounts of the People's Bank until the moment of taking up the liquidation balance-sheet as on December 14, 1917 (paragraph 7); after that moment these operations also appear on the balance-sheet of the People's Bank.

7. All establishments of the former private banks, as well those which are being liquidated entirely as those which are being amalgamated between themselves, must make up the liquidation balance-sheet on December 14, 1917. The drawing up of these balance-sheets, if it has not yet been carried out, must be completed not later than within one month from the day of the receipt of the present circular. As a model for the balance-sheet may serve the form in which the balance-sheets of private banks were published in official publications, but subject to adding all such information as would make it possible to amalgamate these balance-sheets with the general balance-sheet of the People's Bank, and all accounts outside the balance-sheet which are also subject to amalgamation with the corresponding account of the People's Bank. At the making up of a balance-sheet on December 14, 1917, interest on the accounts is reckoned up on December 14, 1917, up to December 31 of the same year. This term is fixed in order to avoid the reckoning of compound interest when calculating interest on January 1.

8. The liquidation report is drawn up for the period beginning on January 1 and ending on December 13, 1917, inclusive, without preparing the profit and loss accounts, and there are added thereto balance-sheets initial and final fully in accordance with the accounts of the General Ledger, and detailed extracts which could give a full picture of each operation and by means of which it would be technically possible to amalgamate these balance-sheets with the general balance-sheet of the People's Bank.

Note.—As to the general valuation of balance-sheets of the establishments of former private banks on December 14, 1917, that valuation will be made later on in accordance with instructions which will be given in due course.

9. Upon the preparation of the balance-sheet on December 14, 1917, with all schedules, the technical liquidation collegiums forward the balance-sheet to the technical collegiums established at the Boards of the former private banks concerned (for example, the liquidation balance-sheets of the branches of the former Volga-Kama Commercial Bank are forwarded to the technical collegium of this Bank in Petrograd, and those of the branches of the banks whose Boards were situate in Moscow to the liquidation department of the Moscow office of the People's Bank). Besides that, the liquidation balance-sheets are presented to the department of local establishments at the Central

Administration of the People's Bank, and lastly these balance-sheets are handed over to the establishments of the former State bank in the localities concerned. In all cases with the balance-sheets are forwarded the detailed schedules, in accordance with the foregoing indications.

10. If the establishments of former private banks are being liquidated (paragraph 7) the liquidation balance-sheets are automatically included in the balance-sheets of corresponding establishments of the People's Bank. If former establishments of private banks are being amalgamated with one or several local branches of private banks, their liquidation balances put together represent the initial balance of the newly operating establishment of the People's Bank. Thereupon all operations carried out after December 14 [1917] already for the account of the People's Bank are entered in the said initial balance-sheet, and thus a balance-sheet for the branch of the People's Bank is ascertainable at any given moment.

These latter balance-sheets are in the ordinary course communicated to the centre for the making up of a general collated balance-sheet for the People's Bank as a whole.

Beginning from the year 1919 all establishments of the People's Bank must present their balance-sheets in the same form as the balance-sheet of the former State bank with such alterations as will be introduced in due course. And generally, all operations of the branches of the People's Bank newly organized out of the former private banks, active as well as passive ones, are carried out in future on the exact basis of the statutes, orders, regulations and circularized instructions of the People's (formerly State) Bank, in so far as these latter do not conflict with the basic principles of the new regime.

11. The accounts of the affiliated branches of the former private banks with their head offices remain on the balance-sheet and appear thereon up to the moment of actual liquidation of the old operations.

12. For the turnover in respect of operation communications between the establishment of the People's Bank and the branches formed out of former private banks, and for the communications of the latter among themselves a special provisional account is opened under the name of " The Liquidation Settlement Account with Bank." To this account are also placed all debt claims of the former State bank against the former private banks (circular of June 5, 1918, No. 861), the latter's free sums on their current accounts with the former State bank and other sums due from the former private banks or due to them on some other accounts. Collateral securities for the above mentioned debt claims are to be returned to the affiliated branches of the former private banks in the cases where they form independent branches of the People's Bank.

13. [Technical matters of book keeping.]

14. Affiliated branches of private banks (reorganized into branches of the People's Bank) use their old orders and blank forms up to the end of 1918. On the blank forms must be put newly prepared corresponding stamps and seals.

15. The daily turnover report with balance-sheet is drawn up in accordance with the form of the People's (State) Bank.

16. According to the above the actual liquidation of the operations of former private banks will be carried out by the establishments of the People's Bank, which liquidation in the strict meaning of this word must affect only

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the accounts which lost the right to exist under the new regime. But the operations of former private banks, which retained their vital basis, may be continued by the People's Bank, and the corresponding accounts of former private banks can get developed also in the books of the People's Bank.

17. Customers are given a definite period from the day of fusion of the banks for the redemption of goods and shipping documents serving as security for loans on call.

18. Should a loan on call remain unredeemed on the expiration of two weeks from the date of the demand for repayment of the loan, the securities are liable to be sold; and should the amount of the securities be insufficient to cover the loan, then a protocol is drawn up to this effect with the participation of responsible officials of the former private banks. The same method of drawing up protocols is applied to term loans issued against goods and shipping documents.

[19 and 20 dealt with technical matters.]

21. The rights of mortgagors with regard to securities guaranteeing all kinds of loans are preserved within limits stipulated in the statutes of private banks. In case of realization of the loan the mortgagor is entitled to receive by way of placing the same on his account with the bank the sums realized by the bank over and above the loan as well as the securities becoming free if the right thereto has not been annulled by existing legislation.

Note.—Securities are not to be returned.

[22 to 36 dealt with technical matters.]

37. In all cases where local fusion has actually already taken place before the publication of the present instructions, and the said fusion was carried out in a manner differing from that indicated in the present instructions, managers and commissaries must bring the fact to the knowledge of the Chief Commissary stating the course of the fusion, the settled form of the fusion, and their views in favour of the retention of the fusion in that form which was adopted in their locality. The work done must not be altered until a reply has been received from the Chief Commissary.

People's Commissary of Finance,
KRESTINSKY.

For Chief Commissary, Manager of People's Bank,
FURSTENBERG.

Published in No. 98 of the Collection of Enactments, 1918, Art. 997, and in No. 36 of the Ekonomitcheskaya Zhizn of December 19, 1918.

Decree of the Council of People's Commissaries of January 19, 1920 (Collection of Enactments and Orders of the Government of Workmen and Peasants, Nos. 4 & 5, Art. 25).

The nationalization of industry has united in the hands of the State the most important branches of production and supply. It has also brought under the general budget system the whole of the industry and trade of the State, which excludes any necessity to use further the People's (State) Bank as an institution of State credit in the former meaning of this word.

Though the system of bank credit still retains its force for small private industrial activity and for the needs of individual citizens who deposit their savings in the State Receiving Offices, though even these objects by reason of their gradual loss of importance in the national economic life no longer require the existence of separate banking institutions; these now secondary

tasks may successfully be fulfilled by the new central and local institutions of the People's Commissariat of Finance reformed on the basis of creation of an apparatus simply and solely for cash operations, estimates and settlement of accounts.

Therefore with the object of unification of the activities of the apparatus for estimates, settlement of accounts, and cash operations the Council of People's Commissaries has resolved:—

(1) To abolish the People's (State) Bank of the Russian Socialist Federal Soviet Republic with all the staffs of officials, establishments and institutions forming part thereof.

(2) To repeal the decree of the Council of People's Commissaries of October 31, 1918 (Collection of Enactments, 1918, No. 81, Art. 849), on the adjustment of accounts between the State Treasury and the People's Bank.

(3) To transfer all the assets and liabilities of the late People's Bank to the Central Budget and Accounts Administration.

(4) To vest the above mentioned Administration and the local establishments with the carrying out of such former banking operations as still retain force and importance.

(5) To vest the People's Commissariat of Finance with the carrying into effect of the present decree.

Signed. President of the Council of People's Commissaries,

VL. ULIANOFF (LENIN).

Administration of Affairs of the Council of People's Commissaries

VL. BONTCH-BRUIEVITCH.

Secretary,

S. BRILCHKIN.

January 19, 1920.

Promulgated in the Izvestia of the All-Russian Central Executive Committee of Soviets of January 25, 1920.

W. H. G.

[IN THE COURT OF APPEAL.]

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BANQUE INTERNATIONALE DE COMMERCE DE PETROGRAD *v.* GOUKASSOW.

Conflict of Laws—Contract made Abroad—Existence of Plaintiff recognized by lex loci contractus, but not by the Law of this Country—Right of Plaintiff to sue here.

The plaintiff bank was incorporated in 1869 according to the law of Russia. It had a branch in Paris. The defendant was a customer of the Paris branch, and under the terms of a special contract made with that branch in France he had financial dealings with the bank previously to the commencement of the Russian revolution in 1917, the result of which was that he was largely indebted to the bank. By decrees of the Soviet Government of Russia made in 1917 and 1918 all private banks in Russia, including the plaintiff bank, were extinguished and ceased to exist. The Soviet Government is recognized by this country, but the French Government refuses to recognize it or the validity of its decrees. In 1920 the officials who continued to carry on the business of the Paris branch sued the defendant in this country in the name of the plaintiff bank to recover the amount of his debt:—

Held, that as, according to the decision in *Russian Commercial and Industrial Bank* v. *Le Comptoir d'Escompte de Mulhouse*, ante, p. 630, the plaintiff bank had ceased to exist, the action could not be maintained, notwithstanding that by the law of France, the country where the contract was made, the action would have been maintainable there.

APPEAL from the judgment of Swift J. at the trial.

The banking company known as the Banque Internationale de Commerce de Petrograd was originally formed in the year 1869, when it was incorporated in accordance with the laws of Russia. It opened several branches in other countries including one in Paris. The Paris branch was registered in France as a foreign corporation trading in France, but was not itself incorporated under the French law. The defendant, a Russian subject, was a customer of the Paris branch of the bank, and he employed the bank under a contract made in 1912 to purchase shares in other companies for him, he paying only 20 per cent. of the value and the bank advancing the other 80 per cent., as security for the repayment of which the shares were deposited with them. The result of these transactions between the defendant and the Paris branch was that before the commencement of the Russian revolution

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in 1917 he was heavily indebted to the bank. In December, 1920, the defendant being then resident in this country, the persons who continued to carry on the business of the Paris branch, commenced this action for the recovery of the money, describing themselves in the writ as "a foreign banking company duly incorporated according to the laws of Russia." The defendant, amongst other defences, alleged that by reason of decrees dated December 28, 1917, February 5, 1918, and April 12, 1918, made by the de facto Government of Russia the plaintiff corporation had ceased to exist, and alternatively by reason of the said decrees and the nationalization of banking corporations in Russia there was no one who could authorize the bringing of an action in the name of the plaintiff bank. The language of those decrees is set out above, pp. 674–681. Russian legal experts were called by both parties to depose as to the effect of those decrees. M. Benkowski, for the plaintiffs, expressed the view that notwithstanding that the bank was deprived of all its assets and property and prohibited from carrying on business, and notwithstanding that the shareholders were compelled to surrender their shares, and the board of directors was abolished, the corporate entity of the bank still survived. On the other hand M. Zavrieff for the defendant was of opinion that as the result of the decrees all private banks in Russia, including the plaintiff bank, had ceased to exist. Upon that evidence Swift J. came to the conclusion of fact that the plaintiff corporation was no longer in existence, and that as the Soviet Government which made those decrees had been recognized by the Government of this country the plaintiffs must be treated in our Courts as non-existent and as incapable of maintaining an action, and that the fact that the Government of France, in which country the whole of the transactions between the plaintiffs and the defendant took place, refused to recognize the Soviet Government or the validity of its decrees made no difference in this respect. He accordingly gave judgment for the defendant. The plaintiffs appealed. On the hearing of the appeal it was agreed between the parties that the evidence of Russian

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lawyers as to the legal effect of the Soviet decrees upon the position of the plaintiff bank which was given in *Russian Commercial and Industrial Bank* v. *Le Comptoir d'Escompte de Mulhouse* (1) should be treated as before the Court in the present case.

Neilson K.C. and *Harold Murphy* for the appellants. The effect of the Soviet decrees was not to dissolve the bank. The evidence of the legal experts in both this and the *Mulhouse* cases shows that though the assets of the bank were taken the legal persona still remained. But, even if that contention is wrong, the fact that the existence of the bank was extinguished, and that its extinguishment was recognized by the British Government, does not conclude the case against the plaintiffs. Here the contract was made in France; and where there is a conflict between the law of the forum and that of the country where the contract was made it is the latter which is to prevail: *Male* v. *Roberts*. (2) Here undoubtedly if the action had been brought in France it would have been maintainable, and if the plaintiffs had recovered judgment there, and then brought an action here upon the foreign judgment, the defendant would have had no answer. The present action ought to be tried on the same principles as if it had been brought in France. A party to a contract made and to be performed in England is not relieved from liability on the contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled: *Gibbs* v. *Société Industrielle des Métaux*. (3) So here the liquidation of the bank by the law of Russia where it was domiciled does not affect its liability on contracts made in France. And the same rule must apply whether the liquidated company is defendant or plaintiff. If liquidation does not extinguish the company for the purpose of destroying its liability neither can it do so for the purpose of taking away its right to sue. No country creating an artificial body, such as a corporation, can give it an existence outside

(1) Ante, p. 630. (2) (1800) 3 Esp. 163.
(3) (1890) 25 Q. B. D. 399.

its own territorial limits. If it is to have any existence in another country it must be because it is recognized by the law of that country. And when a corporation has obtained recognition in a foreign country it is entitled to claim continued recognition of its existence notwithstanding anything done in the country of its origin. Moreover here the branch was registered in France, and when once the legal existence of a branch has been established that existence cannot be taken away except by the law of the country which conferred it. If the French Legislature had enacted that notwithstanding the Soviet decrees the Paris branch should continue to exist, its existence would clearly have continued. The same result must follow by virtue of the general French law upon the refusal of the French Government to recognize the validity of the Soviet decrees. Those decrees being confiscatory and penal in their nature cannot have any operation outside the territory of Russia. The penal laws of foreign countries are strictly local. In *Wolff* v. *Oxholm* (1) the defendant, a Danish subject resident in Denmark, contracted in England a debt to the plaintiff for money lent. The Danish Government pending hostilities passed an ordinance sequestrating debts due by their nationals to British subjects. In an action against the defendant in this country for the recovery of the debt it was held that the ordinance was void as not being conformable to the usage of nations and that the plaintiff could recover. The same principle was applied in *Rey* v. *Lecouturier*. (2) The Order of Carthusian Monks, a religious association founded in the eleventh century, had in 1876 registered in England a trade mark of their liqueur made at the Grande Chartreuse. In 1901 the association was dissolved by the French Government, and their property, including their trade marks in France, was confiscated and passed to a liquidator. The monks moved to Spain, where they continued to manufacture their liqueur. The French liquidator, the defendant, got his name placed on the English register of trade marks in 1904 in lieu of that of the plaintiff, the representative of the monks, and he advertised the

(1) (1817) 6 M. & S. 92. (2) [1908] 2 Ch. 715.

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liqueur made by him as the original and genuine liqueur. On an application by the plaintiff to have the defendant's name struck off the register on the ground that he was passing off upon the public something that was not genuine, it was held that the defendant's name must be expunged. And on similar facts relating to trade marks in the United States it was held that the action of the French Government could not affect the trade mark rights of the Carthusian Monks outside of France: *Baglin* v. *Cusenier Co.* (1)

Rayner Goddard K.C. (*Stuart Bevan K.C.* with him) for the respondent. It may be admitted that if the action had been brought in France the plaintiffs would have been entitled to succeed, not because the bank was still in existence in France, for an artificial person cannot, any more than a natural person, be dead in one place and alive in another—but because the French Court would have to decide the case in ignorance of the true facts. They would have to give judgment for the plaintiffs in ignorance of the fact that the corporation had ceased to exist because, owing to reasons of State, the Court would not allow that fact to be proved. But although the plaintiffs might have got judgment in France it by no means follows that they could successfully sue on that foreign judgment here. In such an action the English Court would allow the real facts to be proved. If a company is dissolved by the act of the State which gave it birth it must be dissolved for all purposes. It cannot be that a company incorporated in one country with branches in other countries cannot be completely dissolved except by the laws of all the countries in which it carried on business. This is a question not of capacity to sue, but of existence. With regard to the contention that confiscatory legislation cannot operate outside the limits of the confiscating country it is enough to say that here the Soviet decrees were not of a confiscatory character: see the judgment of Scrutton L.J. *Aksionairnoye Luther* v. *Sagor.* (2)

Neilson K.C. in reply.

Cur. adv. vult.

(1) (1907) 156 Fed. Rep. 1016.

(2) [1921] 3 K. B. 532, 558, 559.

June 12. The following written judgments were delivered:

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BANKES L.J. The appeal discloses yet another of the novel and complicated situations arising out of the Soviet legislation. The appellant bank was duly constituted in Russia as a joint stock company. It established branches among other places in Paris and in London. The respondent in the year 1912 entered into a contract with the Paris branch, for a breach of which contract the present action is brought. The contract so made is governed by French law, and there is no question but that the present action, if commenced in France, would be maintainable there. It is said however that the action is not maintainable in this country because by laws made by the Soviet Government, which is a Government recognized by this country, the parent bank in Russia has been abolished, and the present appellants have therefore in the eye of the law of this country no legal existence. This Court has had to consider the effect of the Soviet legislation in the case of the *Russian Commercial and Industrial Bank* v. *Le Comptoir d'Escompte de Mulhouse* (1) in which a very considerable body of evidence both parol and documentary was given both as to the Soviet legislation and as to the effect of that legislation upon the Russian bank. It was agreed between the parties to the present appeal that this evidence should be available in the present appeal. This Court has decided in the *Comptoir de Mulhouse* (1) case that the effect of the Soviet legislation has been to extinguish the parent bank in Russia, and that as a consequence the London branch could not maintain an action in this country in the name of the parent bank for breaches of a contract governed by English law. So far the decision of this Court agrees with the view taken by the learned judge from whose judgment the present appeal is made. The further and curious question however arises which was not specifically dealt with in the judgment in the Court below, and which depends upon the fact that the action in the present case is one for breach of a contract governed by French law, which law recognizes the parent bank in Russia as still in existence.

(1) Ante, p. 630.

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If the view of this Court is correct that the parent bank in Russia has ceased to have any legal existence this curious result must follow—namely, that in this country, which has recognized the Soviet Government, the London branch of the Russian bank has no legal existence and cannot sue, yet in France, which has refused to recognize that Government, the Paris branch of the bank has never ceased to have a legal existence and can in France carry on its business and sue and be sued just as it could before the Soviet Government was established. The question of law which has to be decided is whether the Paris branch can maintain the present action in this country. From one point of view it may seem absurd to suggest that a plaintiff, who, in the eye of the law of this country, has ceased to have any legal existence can maintain an action in our Court. On the other hand, it is clear that had the present action been commenced in France it could have been maintainable there. If maintainable there, then why not here? If the question was one merely between capacity to contract and procedure, I should have hesitated long before deciding that the present action was not maintainable, and that the lex fori rather than the lex loci contractus was the law to be applied. The objection to the maintenance of the action appears to me to strike deeper than a choice between these alternatives. The objection is that the party seeking to maintain the action is in the eye of our law no party at all but a mere name only, with no legal existence. Having decided that this contention is correct it follows in my opinion that the action is not maintainable and the appeal must be dismissed. There can be no costs either in this Court or in the Court below, as the objection on which the defendants succeed is that the plaintiffs have no existence and can therefore neither pay nor receive costs. The judgment of the Court below must be amended by striking out any reference to costs.

SCRUTTON L.J. This appeal raises another of the curious questions which English Courts will have to decide in consequence of the recognition by His Majesty's Government of

the Soviet Government, the de facto Government of Russia, and the consequent recognition by these Courts of the Soviet legislation. What effect is to be given in England to transactions entered into in Paris before the Soviet regime with the Paris branch of a bank incorporated in Russia under the laws of Tsarist Russia, in view of the intervention of the Soviet legislation, when, while Great Britain recognizes the Soviet as the de facto Government of Russia, France neither recognizes the Soviet Government nor its legislation ?

Mr. Goukassow, at present resident in England, bought shares in 1915 with the financial assistance of the Paris branch of the plaintiff bank, a company incorporated according to the then laws of Russia. The bank held the shares as security for the money they lent him to purchase the shares. The only thing that happened to the account after the Soviet legislation of 1917–1918 was debits of interest. The bank now purports to sue for the balance of account. Though difficulties might have arisen from the fact that the Soviet Government has confiscated some of the shares while in possession of the bank, the only point raised below was that there was no longer an existent person who could sue, as the bank had been destroyed by the Soviet legislation.

We had just previously considered the case of the *Russian Commercial and Industrial Bank* v. *Le Comptoir d'Escompte de Mulhouse*. (1) It was agreed that the evidence in that case should be taken as given in the present one, and I refer to my judgment in that case for the nature and effect of the Soviet legislation. I am satisfied that its effect was that the artificial person constituted as a corporation by the law of Russia had ceased to exist in Russia, either because of its original destruction or by its amalgamation in the State (People's) Bank which itself was destroyed by Russian legislation before the issue of the writ in the present case. We have not in the present case the detailed information about the head office and its branches that we had in the last case, but it seems that while the plaintiff bank has ceased to exist in Russia, the officials who carried on its Paris branch, while

(1) Ante, p. 630.

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on the one hand using the funds of the branch to float, under the laws of France, a new French company with a similar name, on the other continued to carry on business under the name of the old bank. If the old bank was in law destroyed, this could not enable them to claim the rights of the old bank. It follows from my previous judgment that the English Courts would not recognize an action by the plaintiff bank on a contract made with the English branch, because the plaintiff bank had been destroyed and was non-existent. But the question is as to the effect of the fact that the French Government still regards the bank as existent in France where the contract was made. It does this because, not recognizing the Soviet Government, it does not recognize the laws which are alleged to have destroyed the bank.

There is no doubt that the incidents of a contract are settled by the lex loci contractus. As to the capacity of the contracting party, English law is doubtful. Lord Macnaghten stated the doubt thus in *Cooper* v. *Cooper* (1): "It has been doubted whether the personal competency or incompetency of an individual to contract depends upon the law of the place where the contract is made or on the law of the place where the contracting party is domiciled. Perhaps in this country the question is not finally settled, though preponderance of opinion here as well as abroad seems to be in favour of the law of the domicil. It may be that all cases are not to be governed by one and the same rule." I do not profess to solve the doubt. I am inclined to agree with Mr. A. Dicey's view in Conflict of Laws that "The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and by the law of the country where the transaction occurs." (2) So that, for instance, though the lex loci contractus allows a corporation to own land, if the constitution of the corporation forbids it to own land, it cannot do so in spite of the law of the country where the contract was made. But it seems to me that the question here is not as to incidents

(1) (1888) 13 App. Cas. 88, 108; and see per Lord Watson S. C. 105.
(2) 3rd ed., p. 511.

of contract, or capacity to contract, but existence as a person. A non-existent person cannot sue. In the case of a natural person, the English Courts would decline to entertain an action in his name, and would not be interested in the fact, if it were so, that a foreign country allowed an action in the dead man's name for a year after his death. This would be lex fori. So in the case of artificial persons, the existence of such a person depends on the law of the country under whose law it is incorporated, recognized in other countries by international comity, though its incorporation is not in accordance with their law. If the artificial person is destroyed in its country of origin, the country whose law creates it as a person, it appears to me it is destroyed everywhere as a person. I cannot conceive a company, whose existence and attributes arise solely from the law of Russia, continuing to exist when the law of Russia says it is dissolved. With what body and attributes does it survive, and what law constitutes it? It does not comply with the requisites of English companies and is dissolved by the law of Russia. I can understand the French Courts saying: "This company was validly created by the law of Russia, and we know of and recognize no law which has destroyed it; therefore it still exists." But the English Courts do know and recognize a law which has destroyed it, and in my opinion must apply their own lex fori to determine what person can or cannot sue in their Courts. In my opinion therefore English Courts are bound to treat this plaintiff bank as dissolved and incapable of suit in English Courts.

I have considered the case of *Lecouturier* v. *Rey* (1) and the suggestion that this is a penal law, which the English Courts will not recognize. In that case the order of Carthusian Monks existed all over Europe, and was dissolved only in France, and individual members of the order by name were protecting their English trade marks, and their English trade reputation: they were allowed to do so: and I can understand the view that French legislation could not touch English property, or personal rights. But where the penal

(1) [1910] A. C. 262.

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law has killed the person, I do not see how external Courts which recognize the law can help recognizing the death. It is not as if the person survived but was outlawed; English law might not recognize such a status of which it has no knowledge. Here the corporation is dissolved by the law which has created it, and English law is quite familiar with dissolved corporations, which cannot exist after dissolution. For these reasons I think the judgment below must be affirmed.

I quite appreciate that this judgment may involve difficult questions as to the ownership of property belonging to the deceased corporation. Revolutions and their anarchical legislation do produce results difficult to fit in with the legislation of orderly States. The judges can only endeavour to apply settled principles; legislation, or abstention by the Sovereign from recognition of anarchical States, must do the rest. This appeal must, in my opinion, be dismissed, except that the order as to costs in the judgment below must be deleted, the proper order being that the action be struck out, as the alleged plaintiff has no existence.

ATKIN L.J. This case illustrates the fantastic and I may add deplorable effect of a decision that the Soviet Government decrees in December, 1917, and January, 1918, have dissolved the existing Russian banking corporations. Here is a bank with a branch in Paris to which a customer in Paris has incurred a debt of over 44,000*l.* in the course of business transactions beginning in 1912. If the customer could have been sued in France there could have been no such defence as is set up here. There is in France an existing creditor and an existing debt. But the customer is sued here; and here he says, "True it is that you exist in France and that in France I owe you a real debt; but here you do not exist; and therefore you cannot put the debt in suit against me." In the case of the *Russian Commercial and Industrial Bank* v. *Le Comptoir d'Escompte de Mulhouse* (1) I have already stated my view that the Russian banking corporations were not dissolved by the Soviet legislation; and my view is not altered by the evidence given in this case. But that opinion

(1) Ante, p. 630.

must be taken to be erroneous: the Russian banking corporations were at some time—I am still not quite sure when, but at some time before the issue of the writ in this action—dissolved by Soviet legislation; and under those circumstances it seems to me that the defendant must succeed. We are here not considering the capacity to contract; capacity may well be determined, as is somewhat doubtingly suggested by Mr. A. Dicey (1) in the case of commercial contracts, by the lex loci contractus. We are considering whether the alleged actor exists, and in determining that issue, it appears to me that the Court must apply its own law, the lex fori. Whether the plaintiff in an English Court is alive or dead would be determined on an issue of fact by English evidence and procedure; and it appears to me quite irrelevant to consider whether the Courts of the country where he was domiciled or where the cause of the action arose, would hold him to be alive or dead. In the case of an artificial person, such as a foreign corporation, our law would look to the law of the country which created the corporation, and finding the corporation dissolved by that law, our Court must also treat the corporation as dissolved. The result is that this plaintiff, though alive in France, is dead here. No doubt this case will serve as a solemn warning to the French branches of Russian corporations to beware of allowing assets to pass into a country where, as soon as they reach its territorial limits, they either become the property of the Soviet Government or become bona vacantia. With that I have nothing to do. We must, as has been said, adhere to principles. On principle the plaintiff is dead, and the action must be dismissed. I notice that in this case, as in the last, judgment was given for the defendant with costs. This is a departure from principle and the judgment must be corrected accordingly.

Appeal dismissed.

Solicitors for the appellants: *Stephenson, Harwood & Co.*

Solicitors for the respondent: *Coward, Hawksley, Sons & Chance.*

(1) Conflict of Laws, 3rd. ed., p. 580.

Applied. CAPITAL & PROVINCIAL PROPERTY TRUST, LTD. *v.* RICE. [1950] 2 All E.R. 174.

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May 2.

[IN THE COURT OF APPEAL.]

SUTTON *v.* BEGLEY.

Emergency Legislation—Landlord and Tenant—Dwelling House—Part let as separate Dwelling—Standard Rent—Apportionment—When Dwelling House first let—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 1, 2, 8, 9.

By s. 12, sub-s. 1 (*a*), the expression "standard rent" means the rent at which the dwelling house was let on August 3, 1914, or, in the case of a dwelling house which was first let after the said August 3, the rent at which it was first let.

By sub-s. 2 the Act applies "to a house or part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed," in the appropriate circumstances, "78*l.*, and every such house or part of a house shall be deemed to be a dwelling house to which this Act applies."

By sub-s. 8 "any rooms in a dwelling house subject to a separate letting wholly or partly as a dwelling shall, for the purposes of this Act, be treated as a part of a dwelling house let as a separate dwelling."

By sub-s. 9 the Act does not apply to a dwelling house erected after or in course of erection on April 2, 1919, or to any dwelling house which has been since that date or was at that date being bona fide reconstructed by way of conversion into two or more separate and self-contained flats or tenements.

A dwelling house was let in March, 1921, on a lease for five years at a rent of 100*l.* a year, the lessees paying rates and taxes and doing internal repairs. The rateable value of the house in August, 1914, was 60*l.* gross and 48*l.* net. In June, 1921, the lessees sublet to a tenant four rooms in the dwelling house with the use of a garden, bathroom, and other conveniences for three years at 80*l.* a year.

On an application by the tenant under s. 12, sub-s. 3, of the Act to apportion the rent of the four rooms and appurtenances aforesaid:—

Held, that the rooms and appurtenances were let in March, 1921, when they formed part of the dwelling house, and that, notwithstanding sub-ss. 2 and 8, they were not first let within the meaning of sub-s. 1 in June, 1921, when they were let as a separate dwelling, the dwelling house not having been reconstructed by way of conversion into self-contained flats or tenements within sub-s. 9 and there being no suggestion that its identity had been in any way affected.

Woodward v. *Samuels* (1920) 89 L. J. (K. B.) 689 and *Sinclair* v. *Powell* [1922] 1 K. B. 393 approved.

The county court has jurisdiction to apportion the rent or rateable value of a dwelling house under s. 12, sub-s. 3, upon an original application for apportionment.

Rex v. *Marylebone County Court Judge* [1923] 1 K. B. 365 approved.

Decision of Divisional Court affirmed.

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APPEAL from the decision of a Divisional Court dismissing an appeal from the county court of Warwickshire holden at Warwick.

Charles George Sutton applied to the county court under s. 12, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, for an apportionment of his rent with a view to its reduction, in the circumstances following.

In March, 1921, Julia Ann Begley and Ettie Clarke Stephen, two spinster ladies, took a lease for five years of a large house in Leamington called York House at a rental of 100*l.* a year, and agreed to pay rates and taxes and to do internal repairs. The house contained nineteen rooms, two lavatories, a bath-room, and a large basement with a garden in front and at the back. The rateable value of the premises in August, 1914, was 60*l.* gross and 48*l.* net. During the war it was occupied by the Royal Air Force, who left it in a state of dilapidation. The lessees were minded to occupy part only of the house themselves and, having expended a good deal of money and trouble in making it habitable, they put an advertisement in the papers offering to sublet parts of it. In answer to the advertisement the said C. G. Sutton applied and eventually became tenant of four good rooms on the ground floor and other accessories under an agreement, which he drew up himself.

The agreement was dated June 11, 1921, and was made between Julia Ann Begley and Ettie Clarke Stephen, thereinafter called the landlords (sic), of the one part and Charles George Sutton, solicitor, thereinafter called the tenant of the other part. The landlords agreed to let and the tenant agreed to take All those four rooms, thereinafter called the said premises, on the ground floor of York House with the fixtures and fittings together with the use jointly and in common with the landlords and other tenants of other parts of York House of the entrance hall leading to the said premises, the use of the water closet on the ground floor, the right to use the basement, kitchen and scullery in common with all persons to whom the landlords might have granted or

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might thereafter grant the like right, the right in common as aforesaid to use the bathroom on the second floor at all reasonable times, and the use of the garden in front of the said premises, to hold the same for the term of three years from May 24, 1921, at the yearly rent of 80*l.* per annum payable as therein mentioned.

The tenant agreed (1.) to pay the rent as provided; (2.) to keep the premises in good and tenantable repair reasonable wear and tear thereof excepted; (3.) not to assign or underlet any part of the said premises without the written consent of the landlords; (4.) not to make or permit to be made any alterations or additions to the said premises (except by erecting a partition or partitions) or do or suffer any act or thing to be done which might be or grow to be a nuisance or annoyance to the landlords or use or permit the said premises to be used for any other purposes than those of a private dwelling house; (5.) to keep the garden in front of the said premises in proper order and condition; and (6.) at the expiration or sooner determination of the term to deliver up the said premises in such good and tenantable repair as aforesaid.

The landlords agreed (1.) to pay all existing and future taxes rates assessments and outgoings of every description for the time being payable either by the landlords or tenant in respect to the premises; (2.) to keep the main hall entrance steps of York House clean; (3.) to keep and maintain the main walls in a good structural state of repair and the main drains cleaned and in repair; (4.) not to use or let for any purpose any part of the remainder of York House for use for any other purposes than those of a dwelling house; and (5.) that the tenant paying the yearly rent and performing and observing the agreements thereinbefore contained might peaceably hold the said premises during the said term without any interruption by the landlords or any person claiming under them.

On June 16, 1922, the said C. G. Sutton made an application to the Warwick County Court for the apportionment of the rent on August 3, 1914, and of the rateable value on the

same date of York House comprising the four rooms and appurtenances aforesaid with a view to determining the standard rent of the same respectively for the purposes of the Increase of Rent and Mortgage Interest Restrictions Act, 1920.

On the hearing of the application the county court judge said that if left to his unaided judgment he would have held that the applicant's rooms were not entitled to the protection of the Act, as they constituted a dwelling house within the meaning of s. 12, sub-ss. 2, 8, and 9, and were first let as such in June, 1921, at the present rent which was therefore the standard rent: *Colls* v. *Parnham* (1); but that he was bound by *Woodward* v. *Samuels* (2), approved in *Sinclair* v. *Powell* (3), to hold that the applicant was entitled to have his rent reduced to a proportion of the standard rent of the whole house. He fixed the standard rent of the applicant's rooms and accommodation at 60*l.* a year from May 24, 1921.

On appeal the Divisional Court (Avory and Greer JJ.) affirmed the county court judge.

The defendants appealed.

P. E. Sandlands and *A. A. Dickie* for the appellants. The four rooms and appurtenances are subject to a separate letting. Therefore by s. 12, sub-s. 8, they are to be treated as a part of a dwelling house let as a separate dwelling, and therefore by s. 12, sub-s. 2, they are to be deemed to be a dwelling house to which the Act applies, the rateable value being within 78*l.* This dwelling house was first let in June, 1921, at the rent of 80*l.* a year, which is therefore, by s. 12, sub-s. 1, the standard rent. Therefore there is no ground for the application to apportion the rent.

Secondly, this is an original application to apportion. The only jurisdiction of the county court to apportion is an ancillary or incidental jurisdiction: *Broomhall* v. *Property Agents and Owners.* (4) *Rex* v. *Marylebone County Court*

(1) (1921) 91 L. J. (K. B.) 335.
(2) 89 L. J. (K. B.) 689.
(3) [1922] 1 K. B. 393.
(4) [1922] 1 K. B. 311.

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Judge (1), which is inconsistent with that case, was wrongly decided and ought to be overruled.

T. N. Winning for the respondent was not called on.

BANKES L.J. This is an attempt on the part of the appellants to persuade this Court that it took an entirely wrong view of the Rent Restriction Act in *Sinclair* v. *Powell*. (2) The learned county court judge has stated the facts, and it is unnecessary to repeat them. As he says, the respondent's application to fix the standard rent is entirely without merits. One would therefore be glad to adopt the construction of the Act for which the appellants contend that construction. But it cannot be limited to this particular case and its general application would largely defeat the object of the Act, and would deprive intending tenants of the protection which it was the express object of the Legislature to give them. That the application is without merits is shown by the facts that the respondent is a solicitor who himself drew up the agreement whereby the appellants, two spinster ladies, agreed to let to him four rooms in York House with the right to use other rooms and conveniences for a term of three years at 80*l.* a year; he now seeks to repudiate that bargain and to obtain from the county court an order for the apportionment of what he says is the standard rent of the whole house, an order which would enable him to occupy the parts of the house included in his agreement at a rent much less than that which he has agreed to pay.

Mr. Sandlands contends that the effect of s. 12, sub-s. 8, of the Rent Restriction Act, 1920, is to put the rooms and premises included in this agreement in the same position as if they were a self-contained flat or tenement into which part of the house had been converted within the purview of sub-s. 9. In my view it is neither necessary nor indeed possible to give that construction to sub-s. 8. This sub-section was formerly a sub-section of s. 5 of the Act of 1919, which required a landlord under a penalty to furnish the tenant with a statement of the standard rent which he is under

(1) [1923] 1 K. B. 365. (2) [1922] 1 K. B. 393.

an obligation to pay. The sub-section, then numbered 4, provided that any rooms in a dwelling house the subject of a separate letting as a dwelling should, for the purposes of the principal Act—the Act of 1915—and that Act, be treated as a part of a house let as a separate dwelling. The first part of s. 5 of the Act of 1919 is now s. 11 of the Act of 1920, and sub-s. 4 of s. 5 is now s. 12, sub-s. 8, of the Act of 1920. The application to the county court was made under s. 12, sub-s. 3. That sub-section, or the corresponding sub-section in the earlier legislation, has been before the Courts on former occasions, first in *Woodward* v. *Samuels*. (1) In that case the dwelling house had been let in separate lettings, but without any such structural alteration of the premises as would convert them into separate self-contained flats or tenements. The Divisional Court held that in the circumstances of that case nothing had occurred to change the identity of the original dwelling, and therefore the county court had jurisdiction and ought to apportion the standard rent of the original dwelling. That case came under consideration in this Court in *Sinclair* v. *Powell* (2), and there both Atkin L.J. and I myself expressed concurrence with the view of the Divisional Court in *Woodward* v. *Samuels* (1), but we thought the two cases were distinguishable on the facts in that in *Sinclair* v. *Powell* (2) there had been a change in the original dwelling by converting it into self-contained flats or tenements and that the original dwelling had lost its identity; so that the separate self-contained flats or tenements had each its own standard rent and there was no case for apportioning the rent of the original dwelling. Since *Sinclair* v. *Powell* (2) *Woodward* v. *Samuels* (1) has come before a Divisional Court in *Marchbank* v. *Campbell* (3), where it was applied by Salter J. quite correctly in my opinion. I entirely agree with his statement of the question which he had to decide there, and which we have to decide here, when he says: "The question

(1) 89 L. J. (K. B.) 689. (2) [1922] 1 K. B. 393.
(3) [1923] 1 K. B. 245, 250.

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in this case is, what are the considerations which should guide a judge in deciding (to take the present case) whether this flat was first let in December, 1920, or was let on August 3, 1914. In my opinion this is a question of fact and depends on the nature and extent of the structural alteration. It is not, I think, to be inferred from the terms of s. 12, sub-s. 9, that apportionment must always be made unless the structural alteration amounts to complete reconstruction within that sub-section. Sub-sects. 2 and 3 read together seem to me to imply that, in order to ascertain the actual rent of a dwelling house such as this flat, it will sometimes be necessary and sometimes unnecessary, to resort to apportionment. It is a question of the physical identity of the applicant's dwelling house. To justify a judge in finding that the part was first let when it was first let separately there must be, in his opinion, not merely a new and separate dwelling house in law, by virtue of a new and separate letting, but a new and separate dwelling house in fact, by virtue of substantial structural alteration." In that passage Salter J. in terms negatives the appellants' contention, and the reason which he gives is in accordance with the decision of this Court in *Sinclair* v. *Powell*. (1) In my opinion where, as here, there is nothing in the nature of a structural alteration which has converted the dwelling house into one or more self-contained flats or tenements, or which has so altered the dwelling house that its identity is lost, the jurisdiction of the county court remains to apportion the standard rent of the original dwelling house, and it is quite immaterial that, for certain other purposes of the statute, rooms in a house the subject of a separate letting are to be treated as part of a house let as a separate dwelling.

For these reasons in my opinion the decision of the Divisional Court was right, and the fact that the application was without merits is no reason for questioning the wisdom or the correctness of the decision.

(1) [1922] 1 K. B. 393

With regard to the other point I need only say that *Rex* v. *Marylebone County Court Judge* (1) was rightly decided. The appeal must be dismissed.

SCRUTTON L.J. I am of the same opinion. In my view this case turns on the meaning of s. 12, sub-s. 1 (*a*). The expression "standard rent" means the rent at which the dwelling house was let on August 3, 1914, or in the case of a dwelling house which was first let after August 3, the rent at which it was first let. What is to happen when a house containing many rooms was on lease on August 3, 1914, at one rent without any apportionment between the rooms, and some of the rooms are subsequently let for the first time separately after August 3, 1914? The rooms, in the supposed case, were separately let after August, 1914. Were they also let in August, 1914, in company with other rooms, or can the expression "dwelling house" in s. 12, sub-s. 1 (*a*), be limited to rooms ultimately let as a separate dwelling so that it can be said that these rooms, never having been separately let before, were not let in August, 1914, although they were occupied with others under one contract of tenancy? In my view a dwelling consisting of separate rooms in a house is let if it is let as a part of the larger unit, and it is not first let when it is first separately let if it has previously been let as part of the larger tenement. That is involved in the decision of *Woodward* v. *Samuels* (2), which applies where rooms, which were part of a larger tenement, are let as a separate dwelling house without being bona fide reconstructed by way of conversion into a separate and self-contained flat or tenement or without being so altered that their former identity is destroyed. *Woodward* v. *Samuels* (2) does not apply to a dwelling house which has been since April 2, 1919, or was being at that date, bona fide reconstructed by way of conversion into two or more separate and self-contained flats or tenements. That is by virtue of s. 12, sub-s. 9. And according to the decision of this Court in *Sinclair* v. *Powell* (3),

(1) [1923] 1 K. B. 365. (2) 89 L. J. (K. B.) 689.
(3) [1922] 1 K. B. 393.

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Woodward v. *Samuels* (1) has no application where after August 3, 1914, the larger tenement has been so altered as to have lost its identity. In neither of those cases does *Woodward* v. *Samuels* (1) apply. It does not apply to cases of reconstruction and conversion after 1919 because of sub-s. 9; and it does not apply to cases where identity has been lost before 1919 because of the decision of *Sinclair* v. *Powell* (2), that the three reconstructed flats were three new tenements which had not been let in August, 1914. We are left with a case, which is the present case, where there has been no reconstruction or alteration. The rooms first separately let in June, 1921, had been let in the same condition before that, but as part of a larger house. To hold that in these circumstances the rent at which the whole house was let is not to be regarded, but only the rent at which the room or rooms were first let, which is subject to no restriction except the agreement between the parties, would be entirely to defeat the operation of the Act. The Act was intended to protect small tenants without much regard to their landlords' interests. If a landlord who had let a house, say at 10*l.* a year, was allowed immediately to let each separate room at 10*l.* and to justify so doing on the plea that he was letting a room for the first time, whereas previously he had let the whole house, the Act would be reduced to a nullity. Therefore it appears to me impossible to give to the word "dwelling house" in s. 12, sub-s. 1 (*a*), a meaning which, in the case I have just put, would include the one room subsequently let and exclude the rest of the house. I think therefore that *Woodward* v. *Samuels* (1), or so much of it as is left after *Sinclair* v. *Powell* (2) and after s. 12, sub-s. 9, was rightly decided, and its effect was correctly stated by Salter J. in *Marchbank* v. *Campbell* (3) and repeated by him in *Rex* v. *Marylebone County Court Judge.* (4)

It is not necessary for me to restate or reconsider the view I took in *Sinclair* v. *Powell* (2), where the rooms were let at a time when the house was not subject to any of the Rent

(1) 89 L. J. (K. B.) 689.
(2) [1922] 1 K. B. 393.
(3) [1923] 1 K. B. 245.
(4) [1923] 1 K. B. 365.

Restriction Acts, because in the present case the rooms were separately let after the house had become subject to the Act of 1920. But so far as I have reconsidered what I said I remain of the same opinion.

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For these reasons, applying myself to the question of law and leaving the question of morality to the conscience of the respondent, I think the appeal fails.

ATKIN L.J. I agree. In my view *Sinclair* v. *Powell* (1) determines this matter. I adhere to everything I said there.

Appeal dismissed.

Solicitors for appellants: *Rawle, Johnstone & Co. for Wright, Hassell & Co., Leamington.*

Solicitor for respondent: *C. G. Sutton.*

W. H. G.

NUNAN *v.* SOUTHERN RAILWAY COMPANY (2).

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May 6, 7, 17.

Railway—Negligence—Fatal Accident to Railway Passenger—Negligence of Railway Company—Damages—Contract limiting Company's Liability—Whether Limit applicable to Claim by Widow—Fatal Accidents Act, 1846 (9 & 10 *Vict. c.* 93), *ss.* 1, 2.

Where a person who has agreed with a railway company that its liability in respect of personal injury shall not exceed a certain sum is killed by reason of the negligence of the company's servants, the damages recoverable by his personal representative in an action under the Fatal Accidents Act, 1846, are not limited to such agreed sum.

ACTION tried before Swift J.

The following statement of the facts is taken from the judgment of the learned judge.

On August 21, 1922, John Nunan was a passenger by a train belonging to the defendants, which travelled from Charing Cross to Milton Range Halt. On the arrival of the train at Milton Range Halt he, in order to leave the defendants'

(1) [1922] 1 K. B. 393. (2) Affirmed, [1923] W. N. 285.

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premises, crossed the line, in company with a number of other passengers. At the time that those passengers were crossing the line a light engine approached and owing to fog this engine was obscured from the sight of the passengers, and the passengers were hidden from the view of the engine-driver. The engine ran into the group of passengers; seventeen of them were injured, of whom five, including Nunan, subsequently died. Elizabeth Louisa Nunan, the widow of John Nunan, brings this action under the provisions of the Fatal Accidents Act, 1846, and the Fatal Accidents Act, 1864, alleging that the death of her husband was caused by the negligence of the defendants' servants and that she has sustained pecuniary loss by his death and is entitled to recover damages from the defendants.

The defendants admit that the deceased man met with his death owing to the negligence of their servants, but they allege that at the time of the accident he was a passenger travelling with a workman's ticket issued by the defendants to him or his employers for his use upon similar terms and conditions as apply to workmen's tickets issued under the provisions of s. 32 of the South Eastern and London, Chatham and Dover Railway Companies Act of 1899 (62 & 63 Vict. c. 168), under and by virtue of the terms and conditions of which section the defendants' liability under any claim to compensation for injury or otherwise is limited to a sum not exceeding 100*l*.

It appeared from the evidence that the deceased man was employed by Messrs. Henry Boot & Sons, London, Ld., on certain works for the relief of the unemployed in the course of execution near Milton Range Halt, and that by arrangements made between his employers, the Ministry of Transport and the defendant railway company, the deceased man was carried to and from his work by authority of a railway ticket which was handed to him by a clerk at the booking office at Charing Cross in exchange for a voucher issued to him by his employers.

The railway company was subsequently paid the value of such ticket by the Ministry of Transport acting in pursuance

of the arrangement between them, the employers and the defendants.

On behalf of the defendants it was contended that the deceased man had contracted with the railway company that the amount which he should recover as damages for personal injuries or otherwise should not exceed 100*l.*, and that, therefore, no damages in excess of that amount could be awarded under the Fatal Accidents Acts to his widow, and that as 100*l.* had been paid into Court by the defendants they were entitled to judgment.

On behalf of the plaintiff it was contended that no contract such as alleged had been entered into by the deceased man and that, even if it had been, such contract could not affect the claim of the widow to damages for the pecuniary loss sustained by her in consequence of the death of her husband, and that provided that the death of the deceased was occasioned by a negligent act which would have given the deceased a right to recover damages had he lived, the widow's claim was not affected by any stipulation which he might have made as to the amount of damages which he might have recovered for his personal injuries had he survived the accident.

It was agreed by counsel on both sides, and I think properly agreed, that the question as to whether the deceased man had or had not entered into the alleged contract was a pure question of fact, that is to say, that the circumstances in which he is stated to have contracted must be ascertained and an inference of fact must then be drawn as to whether he did in truth contract as alleged or not. The circumstances in which the deceased man is alleged to have contracted with the railway company so as to limit his right to damages for personal injury to 100*l.* are that he, having obtained from his employer the voucher (which contains no reference to any conditions upon which he would be carried), approached the booking clerk in the ticket office at Charing Cross and handed to him that voucher. In exchange therefor he received a ticket upon one side of which was printed in two places, amongst other things, the words " S.E. and C.R. (see back)." On the

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back of the ticket were three paragraphs printed as follows :— "This ticket is issued subject to the by-laws, rules, and regulations of the managing committee, as published in their train time bills and time-table book. It is issued on the express condition that the holder shall travel from and to the stations named thereon only. If used at any other station the full ordinary fare to such station shall be paid. This ticket is issued subject to the conditions mentioned in the Managing Committees Act, 62 and 63 Vict., c. clxviii., and its use by the holder is to be taken as evidence of a special contract upon those conditions. 'The liability of the company is limited to a sum not exceeding 100*l.*'" On the panel, next to the window from which the ticket was issued, was affixed a notice in a glazed frame. The notice was in small print, with the names of stations to which workmen's tickets were issued written in ink; that notice was easily decipherable by anybody desiring to read it, but was not of itself so conspicuous as to catch the eye of anybody standing at a distance or walking past. In the frame, however, and at each side of the notice were printed in much larger letters, easily visible at a considerable distance, the words: "Workmen's Tickets." On the top of the notice was printed a statement that "the liability of the company under any claim to compensation for injury or otherwise is limited to a sum not exceeding 100*l.*," and beneath the names of the stations to which tickets were issued were printed "conditions upon which the above tickets are issued." These conditions were substantially the same as those printed on the back of the ticket which I have read. The deceased man had for a period of about nine months been obtaining similar tickets from the same ticket office and travelling by the authority of those tickets to and from Milton Range Halt.

Schiller K.C. and *H. D. Samuels* for the plaintiff.

Thorn Drury K.C. and *C. Ince* for the defendants.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

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May 17. SWIFT J. read the following judgment: This was a common jury action tried by consent of the parties before me sitting without a jury. [The learned judge stated the facts and continued:] A number of cases were cited to me to show how the Courts had dealt with the question of fact to be determined in this case in various circumstances. I have examined those cases for the purpose of ascertaining in what way a jury should be directed to approach the consideration of such a question of fact if the matter had been one to be decided by them. I am of opinion that the proper method of considering such a matter is to proceed upon the assumption that where a contract is made by the delivery, by one of the contracting parties to the other, of a document in a common form stating the terms upon which the person delivering it will enter into the proposed contract, such a form constitutes the offer of the party who tenders it, and if the form is accepted without objection by the person to whom it is tendered this person is as a general rule bound by its contents and his act amounts to an acceptance of the offer to him whether he reads the document or otherwise informs himself of its contents or not, and the conditions contained in the document are binding upon him; but that if there be an issue as to whether the document does contain the real intention of both the parties the person relying upon it must show either that the other party knew that there was writing which contained conditions or that the party delivering the form had done what was reasonably sufficient to give the other party notice of the conditions, and that the person delivering the ticket was contracting on the terms of those conditions: see hereon *Parker* v. *South Eastern Ry. Co.* (1); *Watkins* v. *Rymill* (2); *Richardson, Spence & Co.* v. *Rowntree* (3); *Hood* v. *Anchor Line, Ld.* (4); and *Gibaud* v. *South Eastern Ry. Co.* (5)

Approaching the matter from this point of view I think that the deceased man—being an ordinary person of thirty-nine years

(1) (1877) 2 C. P. D. 416.
(2) (1883) 10 Q. B. D. 178.
(3) [1894] A. C. 217.
(4) [1918] A. C. 837.
(5) [1920] 3 K. B. 689.

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of age, who had at one time been employed as a hall porter—knew that there was writing on the ticket which was his authority to travel by the train he did, that he knew such writing contained directly or by reference the terms upon which the defendant company would carry him and that the company had done everything which was reasonably sufficient to call his attention to those conditions and to the fact that they were carrying him on the basis of those conditions. I therefore find as a fact that the deceased man contracted with the railway company that their liability under any claim to compensation for injury or otherwise should be limited to a sum not exceeding 100*l*.

A question arose in the course of the argument as to whether the deceased man had himself contracted with the railway company at all, the ticket being issued to him under a bargain made between them and his employers and the Ministry of Transport. I think that this is immaterial, for, in my view, if the man's fare was not paid by himself it was paid by some one as his agent and on his behalf and he is the contracting party; in any event, whether he paid a fare or not, I think he agreed with the railway company that they should carry him as a passenger and he agreed that they should so carry him on the terms printed upon or referred to on the ticket which entitled him to travel on their train.

It remains to consider whether the claim of the plaintiff is limited by the agreement which her deceased husband made with the railway company that their liability should not exceed 100*l*. Her claim is based on s. 1 of the Fatal Accidents Act, 1846 (commonly called "Lord Campbell's Act"), which provides that: "Whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured." By s. 2 it is provided that "every such action shall be for the benefit of the wife,

husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought."

By the Fatal Accidents Act, 1864, it is provided that if there be no executor or administrator, or if the executor or administrator has not brought an action within six months after the death, then and in every such case such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been if it had been brought by and in the name of such executor or administrator.

By a number of decisions it has been established that the damages recoverable under these statutes for the benefit of the widow or other persons entitled is the pecuniary loss directly resulting to them from the death of the deceased. No solatium can be given for the grief caused by the death of the deceased nor for the loss of his society, nor for the pain and suffering he has endured, nor for expense which may have been incurred, nor for funeral expenses; the beneficiaries are entitled only to such a sum as shall compensate them for the pecuniary loss resulting to them from the death.

The measure of damages is a different measure of damages from that which an injured person is entitled to recover in respect of his personal injuries, and a jury in assessing those damages may have to consider matters which are quite immaterial when adjudicating upon a claim for personal injuries sustained by a plaintiff, and must disregard many matters the consideration of which would be very material to such a claim. The damages to which the beneficiaries under the statute are entitled are damages for a loss which could never be sued for if the injured person had lived, for they would not have resulted from the accident to the deceased if he had lived: see per Cockburn C.J. in *Pym* v. *Great Northern*

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Ry. Co. (1); those damages are compensation for the loss of the actual pecuniary benefit which they might reasonably have expected to enjoy had the deceased not been killed: *Royal Trust Co.* v. *Canadian Pacific Ry. Co.* (2); *Baker* v. *Dalgleish Steam Shipping Co.* (3)

On behalf of the defendants it was contended that as the deceased man had made a contract limiting the railway company's liability to him to 100*l.* his widow's claim under the Fatal Accidents Act, 1846, must be limited to the like amount.

On behalf of the plaintiff it was contended that the damages to which the widow was entitled were quite independent of the right which the husband might have had if he had only been injured and not killed, and that he had no power so to contract as to alter the basis upon which the damages given to the beneficiaries by the statute were fixed or to curtail or limit them.

In order to ascertain which of these contentions is correct it is I think necessary to examine the right which is given to the widow under the Fatal Accidents Acts and to determine whether it is or is not the same right which the deceased man possessed and whether he did, or had any power to, alter it as suggested. There appears to have been some little confusion as to the exact nature of the right of the widow. In *Read* v. *Great Eastern Ry. Co.* (4) Blackburn and Lush JJ. both said that s. 2 may provide a new principle as to the assessment of damages, but it does not give any new right of action. In *Griffiths* v. *Earl of Dudley* (5) Field and Cave JJ. stated that *Read* v. *Great Eastern Ry. Co.* (4) had decided that the Act gives no new cause of action to the relations but only a right in substitution for the right of action which the deceased would have had if he had survived.

On the other hand, in *The Vera Cruz* (6), the Earl of Selborne said: "Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation

(1) (1862) 2 B. & S. 759, 765.
(2) (1922) 38 Times L. R. 899.
(3) [1922] 1 K. B. 361.
(4) (1868) L. R. 3 Q. B. 555, 558.
(5) (1882) 9 Q. B. D. 357.
(6) (1884) 10 App. Cas. 59, 67, 70.

of the maxim *actio personalis moritur cum persona*, because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor. And not only so, but the action is not an action which he could have brought if he had survived the accident, for that would have been an action for such injury as he had sustained during his lifetime, but death is essentially the cause of the action, an action which he never could have brought under circumstances which if he had been living would have given him, for any injury short of death which he might have sustained, a right of action, which might have been barred either by contributory negligence, or by his own fault, or by his own release, or in various other ways." In the same case Lord Blackburn said : " I think that when Lord Campbell's Act is looked at it is plain enough that if a person dies under the circumstances mentioned, when he might have maintained an action if it had been for an injury to himself which he had survived, a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived ; an action which, as is pointed out in *Pym* v. *Great Northern Ry. Co.* (1) is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child, who under such circumstances suffers pecuniary loss by the death."

It seems to me that the right of action given to the executor or to the beneficiaries is clearly a different right of action from that which the deceased would have had if he had survived.

There are certain factors which are common to both rights of action, and before the executor or beneficiaries can recover under the Fatal Accidents Act it is essential that they should show that certain rights would have existed in the deceased man had he lived, but once they have proved that those rights existed and also satisfy the further conditions which the

(1) 2 B. & S. 759 ; 4 B. & S. 396.

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Legislature has imposed upon them in giving them a right to sue, I think they have a different cause of action from that which the deceased would have had if he had survived, and when the decided cases come to be examined I am convinced that there is nothing in them which is inconsistent with this view.

In order that a person who has sustained injuries through the negligence of another may succeed in an action for damages he must prove (1.) that he has been injured by the wrongful act, neglect or default of the defendant; (2.) that he has thereby sustained damage; and (3.) that at the time the action is brought his cause of action still exists.

If he proves injury but cannot show any damage, or if he proves injury and damage but it is established that the damage has been caused or contributed to by his own negligence, or if it be shown that he has barred or settled his claim, he has no right against the defendant.

If he dies in consequence of the negligence of the defendant with his right to damages still existing his executor or beneficiaries named in the statute have a right of action. They must prove (1.) that the deceased person was injured by the wrongful act, neglect, or default of the defendant; (2.) that he died in consequence of such injury; (3.) that at the time he died he had a right to recover damages; and (4.) that the beneficiaries have suffered pecuniary loss from his death. If they prove these four things they have a cause of action, if they fail in any one of them they have no cause of action.

It seems to be clear that there is something more given by the Fatal Accidents Act, 1846, to the beneficiary than a mere new principle of assessing damages. In order to succeed, they must not only show that the deceased has sustained injury through the neglect of the defendants which would have entitled him to damages had he lived, but they must also show that he has died, and that his death has occasioned them pecuniary loss. If during his life the deceased has so dealt with his cause of action that, at the moment of his death he has destroyed it, the executor or

beneficiary cannot sue, for they are unable to prove the first essential condition imposed on them by the statute—namely, that the neglect is such as would, if death had not ensued, have entitled the party injured to maintain an action. For example, if he has been guilty of contributory negligence, there is not at the moment of his death any cause of action in respect of which he could sue, and, therefore, his executor cannot claim: *Waite* v. *North Eastern Ry. Co.* (1); *Witherley* v. *Regent's Canal Co.* (2); and so if he has contracted to the effect that no personal injury shall give him a right of action: see hereon *Griffiths* v. *Earl of Dudley* (3); *Haigh* v. *Royal Mail Steam Packet Co.* (4); and *The Stella* (5); again, if he has accepted a sum in settlement of his claim, for in such case the plaintiff would not be able to fulfil the second obligation imposed—namely, that of showing the right of the party injured to recover damages in respect of the negligence of which the plaintiff complains: *Read* v. *Great Eastern Ry. Co.* (6)

All the cases which refer to the cause of action of the widow as being the same as the cause of action of the deceased person are really dealing with the existence of these two elements in the cause of action—namely, the wrongful act, neglect, or default, and the right to recover damages for it, at the time of the death; and the decisions of all these cases are to be justified on the ground that at the moment of death there was no existing cause of action in the deceased person. For example, in *Read* v. *Great Eastern Ry. Co.* (6) the defendants had paid to the deceased man before he died a sum of money in full satisfaction and discharge of all the claims and causes of action which he had against them, and, as Blackburn J. pointed out, the party injured could not have maintained an action in respect thereof because he had already received satisfaction.

In the case of *Griffiths* v. *Earl of Dudley* (3) a workman

(1) (1859) E. B. & E. 728.
(2) (1862) 12 C. B. (N. S.) 2.
(3) 9 Q. B. D. 357.
(4) [1883] W. N. 151; 49 L. T. 802.
(5) [1900] P. 161.
(6) L. R. 3 Q. B. 555.

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had contracted with his employer not to claim compensation for personal injuries under the Employers' Liability Act, 1880, and it was held that s. 1 of the Act only affected the contract of service so far as to negative the implication by the workman to bear the risks of the employment, and therefore did not render the workman's express contract not to claim compensation invalid. The contract made by the workman in that case was one which prevented him from suing his employer had he lived, and it seems to me clear that this was sufficient to bar any claim under the Fatal Accidents Acts. I do not think that case is any authority for the proposition that a person, whilst reserving a cause of action to himself in case he is injured, may bar the right of any one of the persons named in the Fatal Accidents Act to bring an action if he is killed. I do not find anything in the judgments to make me think that any such view was in the minds of the learned judges who decided that case. The decision seems to me to be completely supportable on the ground that at the time of the man's death he himself had no cause of action, and therefore the widow was not in a position to assert a claim, and I do not see that in the judgments any emphasis at all is laid upon the fact that the contract made between the workman and the employer purported to bind his executor not to bring an action under Lord Campbell's Act.

In *Haigh* v. *Royal Mail Steam Packet Co.* (1), a deceased man, a passenger by steamer, had contracted that the defendants should not be responsible for any act, neglect, or default whatsoever of the pilots, master, or mariners, and it was held that this provision exempted the defendants from liability in an action for the loss of life of a passenger by negligence of the defendants' servants in collision with another ship. In that case Brett M.R. said: "We think that if the passenger had not been killed, but only injured, he could not have recovered for the injury. If this is so, it follows that his executors cannot recover under Lord Campbell's Act"—the reason of course being that the executors were unable to show the existence at the time of

(1) [1883] W. N. 151; 49 L. T. 802, 804.

the death of a wrong for which the deceased could have maintained an action had he lived.

In the case of *The Stella* (1) the deceased man had agreed that "the company are relieved from all responsibility for any injury however caused that may be sustained by the person using this pass." Gorell Barnes J. said: "It is conceded that the widow and children can only claim for loss, under Lord Campbell's Act, where the passenger himself, if alive, could claim for injury done to himself." He then considered the terms of the agreement, and having come to the conclusion that the deceased man himself could not have claimed had he lived, disallowed the claim of the widow.

In *Williams* v. *Mersey Docks and Harbour Board* (2) the husband of the plaintiff sustained injuries in 1902, and died of those injuries in December, 1904. The action was one in which the defendants were acting within the protection of the Public Authorities Protection Act, 1893, and they claimed that as an action had not been commenced within six months after the neglect alleged against them, it could not be maintained. It was held by the Court of Appeal that their view was correct. In the course of his judgment, Mathew L.J. said: "It has been pointed out over and over again that the test of the right to sue under the Act is whether an action could have been maintained by the deceased in respect of his injuries. . . . . It has been decided that, where an action by the deceased man was excluded by the terms of his employment, no action could be maintained after his death by his representative: that, inasmuch as he could not, if alive, have maintained an action, his representative could not do so. Again, where the claim originally made by the deceased man was settled, it was held that his representative could not sue for damages for his death. . . . . Again, where there was contributory negligence on the part of a deceased person, it was held that his representative could not sue. The cases appear to establish a general principle that, where an action could not have been brought by the deceased person, it cannot be maintained in respect of the same accident by his representative." In that

(1) [1900] P. 161, 167. (2) [1905] 1 K. B. 804, 807.

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case the deceased could not have maintained an action against the defendants at the time of his death, or at any time more than six months after the neglect which was said to have caused the injury to him.

From these authorities I think that it is clear that if the deceased man dies through an act of negligence on the part of another, that other is not liable to be sued under the Fatal Accidents Acts, 1846-1864, unless at the time of the death there was an existing cause of action, and such existing cause of action may have been defeated by an antecedent agreement which prevents it from ever arising, or by some act occurring at the moment of the default, such as contributory negligence, or by the deceased not pursuing his remedy within the proper time, or by the matter being settled. But if a cause of action existed at the time when the deceased died, and he was entitled at that moment to recover damages in respect of it, then his executor or beneficiary named in the statute is given a new cause of action, of which the original negligence and right to recover damages are essential factors, but it also requires the death of the deceased and pecuniary loss to the beneficiary to make the new cause of action complete.

In the case which I am now considering, the deceased at the time of his death had a cause of action and he had a right to recover damages. What his injuries were or would have been had he not been killed I do not know. It may be that they would have been slight, but whatever they were he had a right to recover damages for the pain and suffering which they entailed, for any permanent injury which he might have suffered, and for any money which in consequence of the neglect of the defendants he should be out of pocket. By the bargain which he had made with the railway company, he could not recover for his personal injuries, however severe they might have been, more than 100*l.*, but a much smaller sum might have been adequate compensation for him—it is impossible to say what his damages would have been had he lived; all that one can say is that at the time he died he had a cause of action for injuries and a right to recover damages

in respect of them, though he was not entitled, owing to his agreement, to recover more than 100*l.* for his personal injuries.

Under those circumstances, his widow proves that he had a right of action to recover damages, that he is dead, and that she has thereby suffered pecuniary loss.

It is contended on behalf of the defendants that her pecuniary loss cannot exceed 100*l.* I do not agree with this contention. Once she has proved that she has a right to sue under the Fatal Accidents Act, the statute fixes the measure of her damages; they are to be proportioned to the injury which a jury thinks she has sustained through the death of her husband. I do not think that in this case the deceased man ever attempted to bargain as to the rights of his executor or widow in case he was killed. A man may clearly bargain as to his own personal claim for his injuries, but it does not follow that because he may bargain as to his own rights, he either does or may do so with regard to the rights of others, and if he had attempted to do so, I do not think he would have been acting within the scope of his powers. The statute has given the right to the beneficiaries provided that the condition upon which they are to have that right is fulfilled, and I do not think that anybody is entitled to interfere with the statutory method of assessing the beneficiaries' compensation except the executors or beneficiaries themselves.

The widow's compensation is an entirely different matter from that which the compensation of the deceased would have been had he lived and recovered damages, and I can see no reason why a bargain made by the deceased as to the amount of compensation which he should receive for a broken leg or damaged ribs, or any other personal injuries, should affect the claim of the widow to compensation for his death. Had the deceased contracted so as to prevent any right of action from accruing to him, or had he destroyed it before he died, the widow clearly would have had no claim; but since he has not done that, she has a claim under the Fatal Accidents Acts, and I can see no reason for holding that there is anything in her husband's contract to interfere with the assessment of that

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claim in the ordinary way. Sitting here as a jury and assessing the damages in accordance with the directions of the Act of Parliament, and laying down for myself those principles as to the assessment of damages in a case of this sort which I should think it right to state to a jury for their guidance were they dealing with the matter, I have come to the conclusion that the amount proportioned to the injury resulting from the death of John Nunan to the plaintiff is 800*l.*, and I give judgment for the plaintiff for that amount with costs.

Judgment for plaintiff.

Solicitor for plaintiff: *W. C. Crocker.*
Solicitor for defendants: *William Bishop.*

F. C.

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June 15.

In re LEOPOLD ADOLPH CLAREMONT.

Revenue—Legacy Duty—Executor—Carrying in Residuary Account—Presumption of Close of Administration of Estate—Legacy Duty Act, 1796 (36 *Geo.* 3, *c.* 52), *ss.* 6, 22.

Where a person appointed executor and trustee under a will carries in a residuary account, the presumption is that he is declaring that he has brought the administration of the estate to an end and is holding the residue as a trustee; but this presumption can be rebutted. *Attorney-General* v. *Dardier* (1883) 11 Q. B. D. 16 applied.

SUMMONS against Albert William Claremont, the respondent, as executor and trustee of the will of Leopold Adolph Claremont, to show cause why he had made default in paying 37*l.* 8*s.* 1*d.* legacy duty in respect of the residuary estate.

The deceased died on March 18, 1921, leaving the respondent executor and trustee under his will. The estate consisted (inter alia) of 1605 ordinary and seventy-eight deferred shares in a limited company of which the deceased had been sole director, and the residue was bequeathed to the respondent upon trust to sell and apply the proceeds for the benefit of two nieces. In order to obtain probate of the

will the respondent on April 15, 1921, filed an affidavit in which he valued the above ordinary shares at 1*l.* each, and the deferred shares at nil, and duly paid estate duty thereon. On March 1, 1922, the respondent brought in a residuary account in which the above ordinary shares were valued at 8*s.* each instead of 1*l.* The Inland Revenue authorities objected to this, and ultimately the value was agreed at 12*s.* The account concluded in the usual form signed by the respondent, after declaring that the account was just and true: "I offer to pay . . . . the legacy duty . . . . upon the sum of *l.* being the whole of the said residue . . . . which I intend to retain for the use of" the two nieces aforesaid. Deductions having been made from the former payment of estate duty owing to the new valuation of the shares, legacy duty amounting to 37*l.* 8*s.* 1*d.* was assessed on the residuary estate. The respondent in his affidavit on showing cause stated that the company was being carried on by the manager, he (the respondent) being appointed sole director, but that the appointment was a mere form to enable the company to function and to give authority to the manager. He stated further that no dividends had been paid since the death of the deceased, and that in view of the circumstances of the company, detailed by him, no one would, in his opinion, purchase the shares, which accordingly had a problematical value only, though on the passing of the present trade depression the business might improve and a purchaser of the shares be found. If the company was wound up, he added, the estate would probably be insolvent. He stated that the estate had been unable to meet any of its cash obligations, and that he had advanced the money to pay funeral expenses, various debts of the deceased, the estate duty and legacy duty on specific legacies, the whole amounting to 145*l.* When he carried in the residuary account he had intended to advance the money for the present claim himself, but had since changed his mind on considering the prospects of repayment, and the question now was whether he was bound to pay out of his own pocket. Nothing had been paid to the above beneficiaries.

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The *Respondent* in person. It is alleged that I am personally liable under s. 6 of the Legacy Duty Act, 1796 (36 Geo. 3, c. 52), as a "person . . . . taking the burden of the execution of the will . . . . of any person deceased, upon retainer for . . . . the benefit of any other person or persons, of . . . . the residue of any personal estate." The question is whether, having carried in a residuary account, I must be held to have ceased to administer and to have become a trustee retaining the residue for the benefit of the two nieces. I submit that the estate is not yet administered, and that the fact of having carried in that account does not preclude me from saying so: *Attorney-General* v. *Dardier*. (1) That was a decision in favour of the Crown where, after the residuary account had been carried in, it was found that the value of the residuary estate realized much more on sale than that at which it had been estimated in the account. That case must apply in favour of the subject where the value turns out to be less. Sect. 22 of the Act, which deals with the method of ascertaining the duty on property not reduced into money, cannot apply until the administration is finished in fact.

Sheldon for the Crown. It is a question of fact whether the respondent was retaining the residue, and the fact of carrying in the residue account—which the respondent could have delayed had he chosen—is evidence that at the date he carried in the account the estate was cleared of debt and that he was retaining the residue as trustee for the beneficiaries. If his contention be right, then, where the property consists of shares, an executor may say: "I shall not sell at present as I think the shares will increase in value," and so indefinitely postpone the payment of the duty. *Attorney-General* v. *Cavendish* (2) decided that the date when the value of the residue is to be ascertained is that of the carrying in of the residue account. The respondent has chosen to keep the estate instead of selling it. In *Attorney-General* v. *Dardier* (1) the administration had apparently continued as a matter of

(1) (1883) 11 Q. B. D. 16. (2) (1810) Wight. 82.

fact, after the account had been carried in, which is not the case here.

[*Attenborough* v. *Solomon* (1) was also referred to.]

The *Respondent* replied.

ROWLATT J. In this case the question is whether the respondent has made himself personally liable for legacy duty on the residue of the estate of the deceased. I think that the legal position is quite clear, and that he is personally liable if he has retained the property on behalf of the trust which was declared of the residue, and has thus terminated his holding as executor and become the holder as trustee. When an executor carries in the residuary account, it seems to me, looking at the form of it and at its purpose, that prima facie he must be taken to be declaring that he has brought the administration to an end and that he is going to hold the property thereafter as a trustee. This is in accordance with the form of the account and with the practice, for everybody knows that when a residuary account is carried in the executors have liquidated the estate to that point. As a rule they have enough money to pay the duty and there is no reason why the matter should not be ended. If they postpone carrying it in and the Crown presses them, what they ordinarily do is to sell enough of the property to answer the duty.

That is the presumption prima facie, but it can be rebutted. This is certainly so in the case of the Crown as appears from the case of *Attorney-General* v. *Dardier*. (2) In that case, after the residuary account had been carried in the property turned out to be much more valuable when it was sold than was therein stated, and the Crown claimed a further amount which claim must have been upon the footing that although the residuary account had been carried in and it appeared that the administration had terminated, that was not in truth the fact. Pollock B. said (3): "In the present case it is obvious that from the date when Mr. Wood was first

(1) [1913] A. C. 76, 82.

(2) 11 Q. B. D. 16.

(3) 11 Q. B. D. 19.

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called in, which was long before the residuary account was brought in, down to the sale by Messrs. Christie, Manson & Co., the intention of the executor and of the defendant, the legatee, was not that the property in question should be retained by the executor and handed over to the legatee in specie, but that it should be sold and the proceeds thereof accounted for in money, and the fact that, during the interval which elapsed between the valuation and the sale, the officers of the Inland Revenue in ignorance of the real facts accepted such valuation ought not to affect the rights of the Crown." In other words they held that the executors were not really retaining. But if the presumption of retaining is rebuttable in favour of the Crown I think it is rebuttable in favour of the subject. No doubt it is more difficult for the subject to rebut it because in carrying in the account he is aware of the facts while the Crown is not. Therefore in this case, upon a question of fact, I have to see whether the respondent has made out his position. It is one of great hardship. He says in his affidavit: "When I carried in the residuary account I intended to advance the money for the duty myself to the estate as I had done in respect of the funeral expenses, debts and other death duties . . . . but on further consideration, becoming more doubtful as to the ultimate outcome from the shares, I determined not to do so." That is very candid, but I think the effect of it is to destroy and not to establish the respondent's case, because I think it discloses that he intended to retain and advance the money. Therefore I must make the order asked for by the Crown. (1)

Judgment for Crown.

Solicitor for Crown: *Solicitor of Inland Revenue.*

(1) After discussion as to the proper order, the order for payment with costs was made.

W. L. L. B.

Criticised by DENNING, L.J. JAMES *v.* THOMAS H. KENT & CO., LTD. [1950] 2 All E.R. 1099.

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1923
June 7.

Contract—Parol Agreement not to be performed within One Year—Contract of Service as Farm Labourer—Right to sue on Contract at Expiration of Year—Action in Assumpsit for Services rendered—Statute of Frauds, 1677 (29 *Car.* 2, *c.* 3), *s.* 4.

The defendant by a parol agreement engaged the plaintiff to work as a farm labourer at a weekly wage for one year, commencing five days after the date when the agreement was made. The plaintiff twice became ill during the year and was away from work nineteen weeks in all. He was not paid any wages by the defendant during those nineteen weeks, except a certain sum in respect of the first two weeks. After the expiration of the year's engagement the plaintiff brought an action to recover his wages for the nineteen weeks he was away from work. The county court judge gave judgment for the defendant on the ground that the agreement came within s. 4 of the Statute of Frauds and was therefore unenforceable. On appeal:—

Held, (1.) that the contract was not enforceable by reason of the Statute of Frauds; (2.) that the plaintiff could not at the expiration of the year sue upon the contract as an executed contract; but (3.) that he was entitled to sue in assumpsit upon an implied promise by the defendant to pay for the services rendered, and for that purpose to rely upon a local custom, if proved, to pay wages during absence from work through illness.

Dictum of Tindal C.J. in *Souch* v. *Strawbridge* (1846) 2 C. B. 808, 814 discussed and explained.

APPEAL from North Shields County Court.

The defendant on May 7, 1921, engaged the plaintiff by a parol agreement as a farm labourer for twelve months from May 12, 1921, at a weekly wage of 2*l.* 14*s.* with free house and garden, coals led, 80 stone of potatoes and milk at 1½*d.* per pint. The plaintiff became ill from synovitis on June 29 and was laid up till September 11. He was paid his weekly wage of 2*l.* 14*s.* down to July 2, and he received two further payments of 2*l.* 10*s.* each on July 16 and 23, but during the remainder of his illness the defendant paid no wages to him. The plaintiff returned to work on September 12 and was paid his wages down to November 20. On November 19 he became ill again and did no work till January 24, 1922, during which period he did not receive any wages. He returned to work on January 24 and was paid his wages down to May 12, when

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his year's employment terminated. The defendant never purported to terminate the contract.

The plaintiff subsequently commenced an action in the county court in which he claimed to recover 46*l.* 15*s.* as wages due to him under the contract during the periods when he was absent from work owing to illness. He also alleged a custom in the county of Northumberland to pay full wages during sickness, and called one witness who said that he had known at least thirty cases of the custom having been followed. The defendant called no evidence and relied upon the Statute of Frauds. The solicitor appearing for the plaintiff contended that the plaintiff sued not on the contract proved by him but on an implied contract raised by his employment in husbandry, or on a weekly contract implied by his receiving weekly wages, which contract was never terminated.

The county court judge held that the contract sued on by the plaintiff and proved by him came within s. 4 of the Statute of Frauds. He accordingly gave judgment for the defendant.

The plaintiff appealed.

F. D. Morton (*J. Norman Daynes* with him) for the plaintiff. It is admitted that the contract of service comes within s. 4 of the Statute of Frauds, as it was a contract not to be performed within one year and is therefore unenforceable. But when the year has expired and one party to the contract has performed his part of the contract he can sue upon the contract as an executed contract. Tindal C.J. said in *Souch* v. *Strawbridge* (1) that the Statute of Frauds "has no application to an action in the present form, founded upon an executed consideration." The Statute of Frauds contemplates a contract to be performed in the future and does not apply to a contract which has been performed. In the present case the plaintiff is suing for wages for services rendered during the year, and by the custom of the county he is entitled to be paid wages during the period he was absent from work owing to sickness. The county court judge altogether neglected the question as to the existence of the custom.

(1) 2 C. B. 808, 814.

[*Sanderson* v. *Graves* (1); *Knowlman* v. *Bluett* (2); *Mavor* v. *Pyne* (3); and *Britain* v. *Rossiter* (4) were also cited.]

Archibald Wilson for the defendant. The plaintiff has been paid for all the work that he has done, and he is claiming for a period when he was absent from work through illness. Phillimore J. said in *Niblett* v. *Midland Ry. Co.* (5) that in the case of a contract made with an agricultural labourer it was recognized that when the labourer is sick the master is not liable to pay for the whole period, and pointed out that that case was an exception from the general principle of law. The county court judge was not impressed by the evidence as to the existence of a custom in Northumberland to pay wages during illness.

DARLING J. I think that this appeal should succeed and that the case should go back to the county court judge to be reconsidered by him. With regard to the contention that this contract of service was unenforceable by reason of the Statute of Frauds the decision of the county court judge was quite right, and in fact Mr. Morton in his argument on behalf of the plaintiff admitted as much. He however contended that even though the contract was unenforceable nevertheless as the plaintiff had served for the whole time stipulated by the contract he could sue upon the contract as an executed contract. In my opinion that contention is unfounded. I do not think that the plaintiff can sue upon the contract as an executed contract. A dictum of Tindal C.J. in *Souch* v. *Strawbridge* (6) was relied upon in support of the contention. I do not think that the language used by Tindal C.J. is an authority to that effect. What he said was this: "It [the Statute of Frauds] has no application to an action in the present form, founded upon an executed consideration." We must therefore look in order to see what was the form of the action in that case. The first words of the report are: "Assumpsit for board, lodging, etc., supplied

(1) (1875) L. R. 10 Ex. 234.
(2) (1873) L. R. 9 Ex. 1.
(3) (1825) 3 Bing. 285.
(4) (1879) 11 Q. B. D. 123.
(5) (1907) 96 L. T. 462.
(6) 2 C. B. 814.

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by the plaintiff to a child at the request of the defendant. Plea, non assumpsit." That explains that it was an action upon an implied promise by the defendant—that was the assumpsit—to pay for the board and lodging which had been already supplied by the plaintiff at the request of the defendant. It is therefore perfectly plain that it was not an action upon a contract which was within the Statute of Frauds, but was an action upon a contract for a consideration which had been already executed, and was therefore one which Tindal C.J. held was capable of being sued upon because it had been executed. I think that the county court judge did not notice that this case was also an action in that form. It is true that the claim does not say so in those exact words, but seeing what the claim really raised was it seems to me that the county court judge should have amended the claim so as to raise a claim in assumpsit similar to the claim that was raised in *Souch* v. *Strawbridge*. (1) It was made plain that the action was really upon this basis before the county court judge gave his decision, because the solicitor who appeared for the plaintiff said that he put his claim in two ways, the second being on a weekly contract implied by his receiving weekly wages. The contention was however not put as clearly as it might have been. What the plaintiff's solicitor should have said was that the plaintiff sued on an implied contract to pay for the services already rendered, and the amount claimed could be put as the equivalent of the weekly wages although it could not be claimed as the weekly wage, because the wage arose not from the executed contract but from the terms agreed, which were unenforceable by reason of the Statute of Frauds. It was also contended before the county court judge, and evidence was called in support of the contention, that there was a custom in Northumberland that where a labourer became ill and could not perform the services which he had contracted to render they should nevertheless be paid for at the ordinary rate. The witness who gave that evidence said that he had known thirty cases at least of the custom having been followed. That evidence was not

(1) 2 C. B. 808.

contradicted. In my opinion this case should go back to the county court judge for him to consider it upon the basis that the claim is one in assumpsit for services already rendered. It does not follow, even if he thinks that the plaintiff is entitled to succeed, that he should assess the sum to be received by the plaintiff at the same rate as the weekly wages. I also think that he should consider the question as to the existence of the alleged custom and satisfy himself whether or not there is such a custom. If there is, it may be that the custom is not to pay the full wage but something less. I do not know. There was only evidence called on one side.

SALTER J. In my opinion the county court judge was right in holding that the express contract between the parties was unenforceable by reason of the Statute of Frauds, but it does not follow from that that the plaintiff has no legal right to redress against the defendant. It was contended before us that if one party to a contract, which is unenforceable by reason of s. 4 of the Statute of Frauds, has fully performed his part of the contract, he can then call upon the other party to perform his part of the contract—in other words that he can enforce the contract against him. I am not prepared to assent to that proposition, and I do not think that Tindal C.J. intended to lay that proposition down in *Souch* v. *Strawbridge*. (1) What he said was unnecessary to the decision of the case, and an observation of caution was made with regard to it by Coltman J. at the time. I do not think that Tindal C.J. meant to say more than this, that the Statute of Frauds was not inconsistent with the success of the action which he was considering, which was an action in assumpsit for board and lodging. If a party to a contract, which is unenforceable under the Statute of Frauds, has rendered services under that contract to the other party, and the other party has accepted and benefited by those services, then I think that the party who has rendered the services can sue the other party in debt on an implied contract to pay him according to his deserts. That is not enforcing the

(1) 2 C. B. 808.

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unenforceable contract but a different contract which is quite enforceable. That is the plaintiff's right, and I think that this point was raised, though not very clearly, before the county court judge, and it certainly has not been determined.

It is said that the plaintiff has been paid all that is fair, but this has not been decided and must be ascertained. In considering that question the county court judge will no doubt consider any evidence of custom which may be placed before him. Apart from custom it may, or may not, be fair and reasonable to pay wages during sickness. Again it may be fair and reasonable to pay wages during a short period of sickness, but not during a long period of sickness. All these are questions of fact for the county court judge to consider. If the plaintiff can satisfy the Court that he has not been paid all that it is fair and reasonable that he should in all the circumstances receive, he will succeed. If he fails to prove that he will fail. I agree therefore that the case must go back for a new trial.

New trial ordered.

Solicitors for plaintiff: *E. C. Rawlings, Butt & Bowyer, for J. W. C. Daynes, Son & Keefe, Norwich.*

Solicitors for defendant: *Turner & Co., for Charles Percy & Son, Alnwick.*

R. F. S.

[IN THE COURT OF APPEAL.]

C. A.
1923
Feb. 28;
July 30.

In re An Arbitration between MASTERS AND DUVEEN.

Landlord and Tenant—Agricultural Holding—Market Garden—Agreement of Tenancy—Fruit Trees to be supplied by Landlord—Tenant to cultivate on best and most approved System of Gardening—Proviso that Holding not to be deemed to be let or treated as Market Garden—Repugnancy—"Treated"—Agricultural Holdings Act, 1908 (8 *Edw.* 7, *c.* 28), *s.* 5; *s.* 42, *sub-s.* 1.

By the Agricultural Holdings Act, 1908, s. 5: "Subject to the foregoing provisions of this Act, any contract (whether under seal or not) made by a tenant of a holding, by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement comprised in the First Schedule hereto, shall be void so far as it deprives him of that right."

By s. 42, sub-s. 1: "In the case of a holding in respect of which it is agreed by an agreement in writing made on or after the first day of January, 1896, that the holding shall be let or treated as a market garden —(i.) the provisions of this Act shall apply as if the improvements comprised in the Third Schedule to this Act were comprised in Part III. of the First Schedule to this Act. . . .":—

Held, that the word "treated" in sub-s. 1 of s. 42, in the collocation in which it was there used did not mean simply that the holding should be in use or cultivation as a market garden, but that it should be let by one person as landlord and occupied by the other as tenant as a market garden, and so treated as between them for the purpose of governing their rights in respect of the holding as a market garden.

By an agreement in writing dated December 31, 1919, and made between the landlord of the one part and the tenant therein described as "market gardener" of the other part, it was agreed (clause 1): That the landlord should let and the tenant should take the farm therein described for the term of one year from September 29, 1919, and so on from year to year at the yearly rent of 185*l.* by half yearly payments on March 25 and September 29 in each year, and that the tenant should pay to the landlord as a further rent at the rate of 6*l.* per cent. per annum on all sums of money expended by the landlord in the supply of any fruit trees during the tenancy. By clause 7 the tenant was to cultivate the land on the best and most approved system of gardening in general practice in the neighbourhood, and was not to cut down, grub up, or destroy any fruit trees growing in or upon the land, or at any time to be planted thereon, under the provisions of the agreement, without the consent in writing of the landlord or his agent first had and obtained. By clause 9 the landlord was during the term to supply the tenant at his own expense with all fruit trees which might at any time be agreed between the landlord and tenant to be necessary, and the tenant was to pay a certain additional rent in respect of the fruit trees so supplied. Clause 11 contained the following proviso: "That nothing herein contained shall be deemed to be an agreement by the landlord that the

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premises hereby demised or any part thereof shall be let or treated as a market garden or give rise to a claim for compensation for fruit trees or bushes under the Agricultural Holdings Act, 1908, or any statutory modification thereof."

Held, that clause 11 of the agreement contained the clearest possible expression of the intention of the parties that the holding was not to be treated as a market garden; that there was therefore no agreement in writing within the meaning of s. 42, sub-s. 1, of the Act, by which it was agreed that it should be let or treated as a market garden, and therefore no claim to compensation on that basis arose, because the existence of such an agreement was a condition precedent to such a claim.

Held, also, that the agreement was not one which was avoided by s. 5 of the Act, because the condition precedent to the tenant having the right to claim compensation had not been satisfied.

APPEAL from the decision of the judge of the Worcester County Court upon a special case stated by the arbitrator in an arbitration under the Agricultural Holdings Acts, 1908 to 1920.

By an agreement in writing dated December 31, 1919, and made between Charles Joel Duveen (thereinafter called "the landlord") of the one part and William Masters (therein described as "market gardener" and thereinafter called "the tenant") of the other part it was thereby agreed (clause 1) that the landlord should let and the tenant should take the farm known as Carpenters Farm, Boreley, in the parish of Ombersley in the county of Worcester with the farmhouse and buildings thereto belonging containing in the whole eighty acres three roods four perches for the term of one year from September 29, 1919, and so on from year to year at the yearly rent of 185*l.* by half yearly payments on March 25 and September 29 in each year and that the tenant should pay to the landlord as a further rent interest at the rate of 6*l.* per cent. per annum on all sums of money expended by the landlord in the supply of any fruit trees during the tenancy.

The material clauses were the following:—

Clause 7: "The tenant shall cultivate the said land on the best and most approved system of gardening in general practice in the neighbourhood and will not cut down grub up or take away any fruit trees or bushes now growing in or upon the said land or at any time to be planted thereon under the

provisions of these presents without the consent in writing of the landlord or his agent first had and obtained and will preserve the said trees and bushes from injury by cattle and otherwise and also will keep the said land clean and in good condition during the said term and deliver up the same clean and in good condition at the expiration thereof."

Clause 8: "The tenant shall at the proper seasons in each year spud up cut and destroy all rushes thistles nettles and seeds throughout the land to prevent seeding and to keep down moles and spread all molehills and anthills and also shall not mow any part of the pasture land for hay more than once in any year and shall not mow any part of such pasture in two successive years and shall not break up or convert into tillage any land without the landlord's written consent and if he shall do so during the remainder of the tenancy pay the additional yearly rent of 50*l.* for every acre of land which shall be broken up into tillage and so in proportion for any less quantity than an acre such additional rent to be payable half yearly on the days aforesaid and to be recoverable by distress or otherwise as rent hereby reserved."

Clause 9: "The landlord shall during the said term at the request of the tenant supply to the tenant at his own expense with all fruit trees which may at any time be agreed between the landlord and tenant to be necessary and the tenant will pay by way of additional rent interest at the rate of 6*l.* per centum per annum on any sum or sums of money which have been previously or shall be so expended by the landlord in addition to the rent hereby agreed and to accept the said trees and to plant and cultivate the same without claim in respect thereof to be made against the landlord."

Clause 11: "Any asparagus rhubarb or other perennial crop or any fruit bushes planted by the tenant may be removed by him at or before the expiration of the said term hereby demised by making good and replacing the surface soil disturbed by such removal Provided always and it is hereby agreed by the tenant that the landlord or his incoming tenant may elect by notice in writing not less than one month before the expiration of the said term to take such plants

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or bushes by valuation And also that nothing herein contained shall be deemed to be an agreement by the landlord that the premises hereby demised or any part thereof shall be let or treated as a market garden or give rise to a claim for compensation for fruit trees or bushes under the Agricultural Holdings Act, 1908, or any statutory modification thereof."

Notice to quit, expiring on September 29, 1921, having been given by the landlord to the tenant, the tenant claimed compensation on the basis that the holding was a market garden.

It was proved before the arbitrator that the holding for about thirteen years before September 29, 1913, was cultivated by the previous tenant as a market garden within the meaning of s. 48, sub-s. 1, of the Agricultural Holdings Act, 1908, and that the present tenant, with the knowledge of the landlord, took over the holding of the previous tenant and had continued to cultivate it as a market garden.

The tenant relied on the agreement of December 31, 1919, and contended that by that agreement it was agreed that the holding should be let or treated as a market garden as required by s. 42, sub-s. 1, of the Agricultural Holdings Act, 1908. The landlord contended that it was not so agreed by the agreement.

The question submitted by the arbitrator for the opinion of the Court was whether by the agreement of December 31, 1919, it was agreed that the holding should be let or treated as a market garden as required by s. 42, sub-s. 1, of the Agricultural Holdings Act, 1908.

The county court judge answered the question in the negative.

The tenant appealed. The appeal came on for hearing on February 28, 1923, and after some argument the matter was ordered by the Court to go back to the arbitrator to find how much of the holding was in fact cultivated as a market garden.

In pursuance of the order of the Court the arbitrator, by his report dated July 13, 1923, found that the eighty acres

were cultivated by the tenant during his tenancy as follows: (1.) 59·168 acres as a market garden; and (2.) 20·608 acres as pasture for purposes common to a market garden and any other agricultural holding—e.g., a farm or small holding.

The case having been restored to the list the hearing of appeal was continued July 30, 1923.

Compston K.C. and *S. E. Pocock* for the appellant. There was clearly an agreement between the parties in this case that the holding should be treated as a market garden within s. 42, sub-s. 1, of the Act of 1908. Various clauses of the agreement of December 31, 1919, are consistent with that view: see clauses 7, 8 and 9. The appellant is described in the agreement as a market gardener, and under it fruit trees are to be supplied by the landlord, which would be inconsistent with the holding being treated as other than a market garden. The Court in determining the question will have regard to the surrounding circumstances. It is found by the arbitrator that for thirteen years before September 29, 1913, when the appellant took over the holding, the then tenant cultivated the holding as a market garden, and that appellant with the knowledge of the landlord took over the holding of the tenant and continued to cultivate it as a market garden.

If, as is submitted, there was an agreement that the holding should be let or treated as a market garden then the proviso in clause 11 of the agreement that it should not be so treated is repugnant and void under s. 5 of the Act, which provides that any contract made by a tenant of a holding, by which he is deprived of his right to claim compensation in respect of improvements shall be void so far as it deprives him of that right.

H. H. Joy for the respondent. Sect. 42, sub-s. 1, of the Act was passed with a view of avoiding such a point as that raised in this case. The agreement of December 31, 1919, in terms provides for the letting of a farm and, it is submitted, that it does not constitute an agreement in writing that the holding shall be "let or treated" as a market garden. The

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scheme of the Act is that there must be an agreement in writing that the holding must be let or treated—i.e., regarded, as a market garden: *In re Kedwell and Flint & Co.* (1); *Morse* v. *Dixon.* (2)

[ATKIN L.J. referred to *Smith* v. *Callander.* (3)]

Sect. 15, sub-s. 3, of the Agriculture Act, 1920 (10 & 11 Geo. 5, c. 76), emphasises the use of the word "treated."

The existence of such an agreement is a condition precedent to the right of the tenant to claim compensation. Here there is no such agreement.

[He also referred to the Market Gardeners Compensation Act, 1895 (58 & 59 Vict. c. .27), s. 3; Spencer on the Agricultural Holdings Acts, p. 89, and Form 17, ibid., p. 238.]

Compston K.C. in reply.

LORD STERNDALE M.R. I do not say that this point is very clear, but in my opinion Mr. Joy's contention is right. The question is whether under a certain agreement the tenant is entitled to claim compensation on the footing of his holding being a market garden, that is to say, whether he is entitled to claim compensation under Sch. III. of the Act of 1908. That depends upon the proper construction of s. 42, sub-s. 1, of the Agricultural Holdings Act, 1908, which provides: "In the case of a holding in respect of which it is agreed by an agreement in writing made on or after the 1st day of January, 1896, that the holding shall be let or treated as a market garden—(i.) the provisions of this Act shall apply as if the improvements comprised in the Third Schedule to this Act were comprised in Part III. of the First Schedule to this Act. . . . ." That is to say, putting it shortly, he shall have compensation as a market gardener. But that is only in a case where it is agreed in writing that the holding shall be treated as a market garden.

Now "treated," of course, is a wide word, but in the collocation in which it is used in the sub-section it does not, in

(1) [1911] 1 K. B. 797, 804.
(2) (1917) 117 L. T. 590; [1917] W. N. 274.
(3) [1901] A. C. 297.

my opinion, mean simply that the holding shall be in use or cultivation as a market garden, but that it shall be let by one person as landlord and occupied by the other as tenant as a market garden by agreement in writing, and so treated as between them for the purpose of governing their rights in respect to the holding as a market garden. That, in my opinion, is the meaning of the word "treated" in that sub-section. I think that view is confirmed by sub-s. 2 of the same section, which in dealing with certain particular tenancies clearly shows that in respect of those tenancies the use and cultivation as a market garden is not necessarily a letting or treating as a market garden, because it provides: "Where under a contract of tenancy current on the 1st day of January, 1896, a holding was at that date in use or cultivation as a market garden with the knowledge of the landlord"—that is the position, "use or cultivation"—and certain improvements have been made, "the provisions of this section shall apply, in respect of that holding, as if it had been agreed in writing after that date that the holding should be let or treated as a market garden." If cultivation as a market garden was to be enough to cause the holding be held to be treated as a market garden that provision would, it seems to me, be unnecessary. At any rate, whether necessary or not, that sub-section shows that s. 42 is not using the word "treated" as if it were equivalent to use or cultivation, or as if use or cultivation were equivalent to treated. Now taking that as being the meaning of the section there is no doubt this agreement here is not quite clear, because it does, as it seems to me, provide for cultivating the holding as a market garden, and as a fact the holding was so cultivated. But that is not enough under the section. Under the section the holding must in fact be a market garden. If it is not of course the provisions cannot apply at all, but when once it is established that it is in fact a market garden something further must be established —namely, that there is an agreement in writing that it should be so let or treated. I have already said what I think is the meaning of those words.

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Lord Sterndale M.R.

The agreement in the present case first describes this tenant as a "market gardener." I do not attach much importance to that, but the agreement does provide in clause 1 for something with regard to fruit trees with which I need not trouble. Then it provides in clause 7—and this is the important clause in favour of the tenant: [His Lordship read the clause.] Then clause 9 is perhaps not so much in favour of the tenant. It provides: [His Lordship read the clause.] Then clause 11, which is really the important clause, provides: [His Lordship read the clause.] That clause contains the clearest possible expression of the intention of both parties to the agreement that the holding shall not be let or treated as a market garden. There is, therefore, no agreement in writing by which it is agreed that it shall be let or treated as a market garden, and therefore no claim to compensation arises, because the existence of such an agreement is, in my opinion, a condition precedent to the right of the tenant to claim compensation. It is said that the agreement is avoided by the provisions of s. 5 of the Act, which provides that any contract made by a tenant of a holding by virtue of which he is deprived of his right to claim compensation under the Act in respect of any improvement comprised in the First Schedule thereto shall be void so far as it deprives him of that right. That contention seems to me entirely to beg the question. If a tenant has a right to claim compensation then he cannot contract himself out of that right; but the question here is whether he has such a right at all. In my opinion, for the reasons I have given, the tenant has no such right, because the condition precedent to his having it has never been satisfied.

I do not think it necessary to express any opinion whether s. 15 of the Act of 1920 would apply to a case of this kind where there is an existing agreement. If it does apply it only strengthens the conclusion at which I have arrived, because it shows that the tenant could have put himself right, if the committee thought fit to admit his claim, by asking the committee to come to a decision which is mentioned in that section.

I think, therefore, that the answer given to the question by the learned county court judge is right—namely, that by the agreement in writing made between the parties and dated December 31, 1919, it was not agreed that the holding therein referred to should be let or treated as a market garden as required by s. 42, sub-s. 1, of the Agricultural Holdings Act, 1908. The result is that the appeal fails and must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. I think the real question is what is the proper meaning of the word "treated" in sub-s. 1 of s. 42 of the Act of 1908. The words are: [His Lordship read the sub-section and continued:] What is meant by the words "let or treated"? There is no difficulty about "let." With regard to "treated" there may be two views of the meaning of the word. It may mean used and cultivated, that is, physically treated, as a market garden; or it may mean treated as between the parties as a market garden, so that the landlord shall become the landlord of a market garden and the tenant a tenant of a market garden. In my opinion the latter is the true construction. I think that view is supported by sub-s. 2, because that sub-section shows that without the assistance of the express provision of that sub-section land used or cultivated as a market garden with the knowledge of the landlord on the date therein mentioned would not under that sub-section have been within the provisions of s. 42. I think, therefore, the true construction of the section is that "treated" means treated as between the parties, that is to say, the land may be used or cultivated as a market garden and yet may not be within the provisions of s. 42.

Now what is the true meaning of the agreement read in the light of that interpretation, which I think is the right interpretation of s. 42? In my opinion it is this. The agreement contained a number of provisions for the use and cultivation of the land as a market garden, and the effect of clause 11 seems to me to be this: The parties there have deliberately agreed that, notwithstanding the provisions as

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to use and cultivation, the holding shall not as between them be treated as a market garden for the purposes of s. 42. So read, it seems to me that the clause is not repugnant to the rest of the agreement, but explains what the parties meant by the provisions as to use and cultivation—namely, that they were not to be accepted as conclusive evidence that the land was to be a market garden within the meaning of the Act, but, on the contrary, that the tenancy as a whole should not be treated as that of a market garden. I think the decision of the learned county court judge was right. I would only add with regard to s. 5 that I agree with the Master of the Rolls that to rely on that section as avoiding the provisions of clause 11 of the agreement is entirely to beg the question.

I think the appeal ought to be dismissed.

ATKIN L.J. Agreed.

Appeal dismissed.

Solicitors for appellant: *Ellis & Fairbairn.*

Solicitors for respondent: *Vertue, Son & Churcher.*

W. I. C.

[IN THE COURT OF APPEAL.]

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THE UNITED STATES OF AMERICA REPRESENTED BY THE UNITED STATES SHIPPING BOARD *v.* R. DURRELL AND COMPANY, LIMITED.

[1921. U. 1048.]

SAME *v.* DUFFELL.

[1921. U. 1169.]

SAME *v.* BUTT AND SONS.

[1921. U. 1171.]

Ship—General Cargo—Bills of Lading—Discharge of Ship—Demurrage—Unequal Terms among Consignees—Implied Condition—Prevention of Discharge.

A steamer loaded a general cargo at Gothenburg for London. The most part of the cargo was loaded under bills of lading which contained two clauses; the first clause provided that the cargo should be discharged at the rate of so many tons or standards a day and that demurrage should be at a certain rate a day to be paid by consignees in a certain proportion to the freight of the whole cargo; the second clause provided that time for discharging should begin to run twenty-four hours after the ship's arrival in a certain roadstead, whether a berth was available or not. A portion of the cargo was loaded under bills of lading from which the second clause had been struck out. Another portion was part of a consignment which had been shipped under a bill of lading on another steamer and had been transhipped on the steamer in question without any further bill of lading.

The steamer arrived in the roadstead but was unable to find a berth for eleven days. Those bills of lading which contained the two clauses imposed on their holders liability for their proportion of thirty-three days' demurrage. The bills of lading from which clause 2 had been struck out imposed liability for a proportion of twenty-two days' demurrage. The bill of lading which comprised the transhipped portion provided for demurrage at a lower rate than that fixed by the others:—

Held, that a shipowner by giving bills of lading imposing upon consignees unequal obligations in relation to discharge and demurrage does not as a matter of law prevent those consignees who are under the more onerous obligations from performing those obligations.

Held, further, that there was in the circumstances no implied condition that all the bills of lading should be in the same terms.

Judgment of Bailhache J. (1) reversed.

APPEAL from the judgment of Bailhache J. (1) in three actions tried together before the learned judge without a jury.

(1) (1923) 28 Com. Cas. 163.

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The plaintiffs claimed in each case for demurrage of their steamship *Bethlehem Bridge* in October and November, 1919, in the following circumstances. The plaintiffs had chartered the vessel to one Hagen Jörgensen, a Norwegian shipowner, on September 17, 1919, on a voyage charter to proceed to Gothenburg and load a general cargo for London and there to discharge within a reasonable time with a fixed rate for demurrage. Jörgensen put her on berth at Gothenburg as a general ship and she loaded about 150 parcels of general cargo including three parcels of timber of which the defendants were the consignees. When bills of lading for the cargo were presented Jörgensen stamped on most of them, including those of R. Durrell & Co. and Duffell, with a rubber stamp two marginal clauses as follows :—

"Cargo to be discharged at the rate of 450 tons, 200 standards, per regular working day, with a demurrage of 600*l.* per day payable pro rata freights.

"Time for discharging to count 24 hours after steamer's arrival in Gravesend Road or other road or roadstead as steamer might be ordered by English authorities whether berth or not available, and always irrespective of turn war circumstances customs of the port and charter clauses on (sic) the contrary."

Jörgensen would have stamped these two clauses on all the bills of lading, but two of the shippers at Gothenburg objected to the clause commencing "Time for discharging," and that clause was struck out of their bills of lading. The clause commencing "Cargo to be discharged" was stamped on all the bills of lading. The clause commencing "Time for discharging" was stamped on the bills of lading of the defendants Duffell and R. Durrell & Co., but it had been struck out of Butt & Sons' bill of lading.

Another steamer, the *Kaskaskia*, belonging to the plaintiffs, loaded a parcel of timber including thirty-two standards stowed on deck. The parcel was consigned to Messrs. Baynes & Sherborne of London under a bill of lading similar to the defendants' bills of lading except that the cargo was to be discharged at the rate of 400 tons, 200 standards, per

regular working day and that demurrage was at the rate of 200*l.* per day. Soon after the *Kaskaskia* weighed anchor it was found necessary to tranship the thirty-two standards, and the *Kaskaskia* proceeded on her voyage without them. They were stowed on the deck of the *Bethlehem Bridge* without any further bill of lading. The original bill of lading for the whole parcel was forwarded to the consignees, Messrs. Baynes & Sherborne.

The *Bethlehem Bridge* arrived at Gravesend Road on October 11, 1919. Under the bills of lading of the defendants Duffell and R. Durrell & Co., which contained the second stamped clause, the time for discharging was taken as beginning to run on October 14, and as expiring on October 24. Owing to the congested state of the Port of London the steamer could not get into a discharging berth until October 22. She began discharging on October 23, and finished on November 26. She was therefore on demurrage, according to two of the bills of lading, for about thirty-three days. The liability for demurrage incurred on the footing of these bills of lading amounted to 20,080*l.* 8*s.* 4*d.*, being thirty-three days and some hours delay at 600*l.* a day. The first two defendants were sued for sums bearing to 20,080*l.* 8*s.* 4*d.*, the proportion which their freights respectively bore to the freight for the whole cargo of the *Bethlehem Bridge*.

According to Butt & Sons' bill of lading, from which the second stamped clause was struck out, the time for discharging did not begin to run until October 22, when the vessel got into a discharging berth, and the days of demurrage did not begin until November 2 or 3. The liability for demurrage incurred on the footing of this bill of lading amounted to 13,924*l.* 3*s.* 4*d.*, and these defendants were sued for a sum bearing to that amount the proportion which their freight bore to the freight for the whole cargo of the *Bethlehem Bridge*.

The defendants pleaded that it was an implied condition of the bills of lading that all the shippers or receivers of cargo should be bound by the same terms relating to the discharge of the steamer, and that all the goods on board the

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steamer should be liable to pay freight. They alleged (1.) that by stowing part of the *Kaskaskia's* cargo on the hatches of the *Bethlehem Bridge* the plaintiffs had in point of fact hindered and impeded them in discharging their cargo, and contended (2.) that, by allowing some of the holders of bills of lading a longer time for the discharge of the ship than they allowed to others, the plaintiffs had in point of law prevented discharge within the shorter time. The learned judge invited the defendants to argue the second point, and came to the conclusion that it was an implied condition that all holders of bills of lading of goods shipped on the *Bethlehem Bridge* should be under the same obligation to discharge the ship, and that by allowing some of the consignees a longer time than they allowed to others the plaintiffs had prevented the defendants from discharging the ship within the stipulated time and had thereby relieved them of their obligation to do so and had placed them under the less stringent obligation of discharging within a reasonable time. He also held that all the defendants had performed the obligation to discharge within a reasonable time, and he therefore gave judgment for the defendants.

The plaintiffs appealed.

R. A. Wright K.C. and *James Dickinson* for the appellants. The learned judge has laid down a new principle in the law of carriage by sea, one which so far from being supported is negatived by the authorities. The grounds of his judgment are expressed thus: "I agree that it is implicit in the terms in which the first clause is worded that all bill of lading holders shall be in the same position as regards time for discharging. Whether it is implicit or not, in my opinion it must be so from the nature of the case. Demurrage is payable in respect of the detention of a ship from her owner after her lay days have expired, and, obviously, she is not so detained so long as the lay days allowed to some of the bill of lading holders have not expired. Demurrage is not payable in respect of a hold of the ship but of the ship herself. I do not understand how a ship can be both on demurrage and

not on demurrage at the same time." This reasoning is unsound. It is settled that each holder of a bill of lading makes a separate contract with the shipowner: *Porteus* v. *Watney*. (1) How then can one clause in one bill of lading imply a promise that all the bill of lading holders shall be in the same position as regards time for discharging?

Secondly, it follows from this and from the learned judge's own definition of demurrage that a ship may be on demurrage and not on demurrage at the same time. One consignee may undertake for the discharge of the ship in five days; another may be allowed ten days; if the ship is discharged in seven days the first consignee is liable for demurrage, but the second is not.

Thirdly, the learned judge proceeds: "Further, by allowing lay days on one basis to one set of bill of lading holders and on another basis to another set, the shipowner has himself created a position in which it almost inevitably must be, and in this case was, impossible for the holders of the more onerous bills of lading to perform the obligation imposed upon them. I think it is true to say that the owners prevented the defendants from performing their contract." No doubt a shipowner, who prevents the owner of goods from clearing his goods within the time allowed for discharging the ship, cannot sue him for demurrage: *Budgett* v. *Binnington* (2); *Alexander* v. *Aktieselskabet Hansa*. (3) Whether he does prevent him is a question of fact. But the learned judge has not gone into the facts. It cannot be maintained that as matter of law a shipowner, who allows the holder of one bill of lading five days, and the holder of another ten days, for the discharge of the ship, thereby prevents the former from discharging in five days. If his cargo was at the top of the hold the existence of the second bill of lading may not affect him in the least.

Stuart Bevan K.C. and *Claughton Scott K.C.* for the respondents. The learned judge came to the right conclusion. Assuming, but without admitting so doubtful a

(1) (1878) 3 Q. B. D. 223, 534, 542. (2) [1891] 1 Q. B. 35.
(3) [1920] A. C. 88.

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proposition, that the word " cargo " in the first clause means the whole cargo of the ship, the discharge is the joint act of the shipowner and the cargo owners: *Budgett* v. *Binnington* (1); and each agrees to do all that is necessary to promote the operation: *Mackay* v. *Dick* (2), per Lord Blackburn; *Dodd* v. *Churton*. (3) By allowing the lay days to begin for Butt & Sons at a later date than for the other respondents, the appellants committed a breach of that agreement. Moreover the agreement was a condition and not a mere warranty. It is necessary, in order to secure active co-operation in the discharge of the ship within the time named, that all cargo owners should be under the same incentive.

If the appellants' breach of the agreement did not as a matter of law prevent the discharge of the ship within the stipulated time, which it is submitted it did, there was ample evidence available to show that the respondents were in fact delayed not only by the appellants' breach but by their loading part of the *Kaskaskia's* cargo on the hatches of the *Bethlehem Bridge*. This evidence has never been heard.

James Dickinson in reply. The respondents' case at its highest is that the appellants committed a breach of contract which entitled the respondents to repudiate the goods. They accepted the goods and thereby reduced their right to a claim for damages. They have proved no damage.

Cur. adv. vult.

April 30. The following written judgments were delivered:—

SIR HENRY DUKE P. The appellants in these cases claimed in three actions which were tried in the Commercial Court before Bailhache J., to recover against the respective defendants as consignees of goods shipped on board the plaintiffs' steamship *Bethlehem Bridge* at Gothenburg, and received by the respective defendants in London, various

(1) [1891] 1 Q. B. 35. (2) (1881) 6 App. Cas. 251, 263.
(3) [1897] 1 Q. B. 562, 568.

sums alleged to be due from the defendants by reason of non-completion of the discharge of the *Bethlehem Bridge* within a time fixed by the bills of lading under which the defendants received delivery of the goods. The learned judge gave judgment for each of the defendants on the ground that completion of the discharge of the *Bethlehem Bridge* within the stipulated time had been prevented by the plaintiffs. From these judgments the plaintiffs appeal. The appeals were by consent heard together. The form of the bills of lading in question and the circumstances of the case were exceptional, and some questions of law which were argued before us are said not to have been heretofore determined.

The *Bethlehem Bridge* was, as appeared, loaded at Gothenburg in September/October, 1919, as a general ship with a miscellaneous cargo. Separate bills of lading were issued for about 150 consignments. The goods discharged to the defendants consisted of sawn timber of various denominations. The bills of lading under which the first and second defendants took delivery were stamped with marginal clauses in these terms: "(a) Cargo to be discharged at the rate of 450 tons, 200 standards, per regular working day, with a demurrage of 600*l.* per day payable pro rata freights. (b) Time for discharging to count twenty-four hours after steamer's arrival in Gravesend Road or other road or roadstead as steamer might be ordered by English authorities whether berth or not available, and always irrespective of turn war circumstances customs of the port and charter clauses on the contrary." The second of the two clauses was omitted in the bill of lading issued to the shipper of the goods delivered to the third-named defendants. It was stated at the hearing that bills of lading with identical marginal clauses were issued in respect of each except three of the consignments which made up the cargo. The bill of lading under which the defendants Butt & Sons were sued, contained only the first of these marginal clauses, and one other consignee was said to hold a like bill of lading. One parcel of the cargo consisted, it was said, of timber goods

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originally shipped on another vessel of the plaintiffs'—the steamship *Kaskaskia*—which, having fallen overboard from the *Kaskaskia*, had been reshipped by the plaintiffs on board the *Bethlehem Bridge* without a bill of lading. The defendants complained of the circumstances attending the issue of the bills of lading, alleging that they were handed out to the shippers of cargo without notice of the marginal clauses at so late a period as to give no fair opportunity of acceptance or rejection. No relief on this ground, however, was claimed in the actions, and in view of acceptance by each defendant of the goods comprised in the bill of lading of which he was holder, it is difficult to attribute to this alleged hardship any effect in law in relation to the dispute between the parties.

The cargo of the *Bethlehem Bridge* amounted to 2869 tons and 469,117 standards, and the time of discharge under the first of the marginal clauses to 8 days, 17 hours, 17 minutes. This time expired on October 24. The discharge was completed on November 26, and on the footing of a period of demurrage of thirty-three days and upwards at 600*l.* per day the first and second defendants respectively were sued for such proportion of a total sum for demurrage of 20,080*l.* 8*s.* 4*d.* as the freight of their goods bore to the freight of the whole cargo of the ship. Under the bill of lading issued to the third defendants the time for discharge of the ship expired on November 3, and the alleged period of demurrage is twenty-three days and part of a day. The total amount of demurrage for those days is stated at 13,924*l.* 3*s.* 4*d.*, and the proportion claimed from these defendants is the proportion of their freight to the total freight. The discrepancy between the liability to pay for detention of the ship imposed by the terms of bills of lading 1 and 2, and the liability imposed by bill of lading 3, was one of the main grounds upon which counsel for the defendants contended that the defendants ought to be held free of liability for any detention.

The learned judge at the trial gave judgment in favour of the first and second defendants on the ground that it is an implied term of the first marginal clause that all holders

of goods shipped on the *Bethlehem Bridge* should be in the same position as regards time for discharge. In support of this view he accepted an argument that the issue to many shippers of bills of lading containing the marginal clauses in question bound the plaintiffs to all the shippers by a scheme of shipment and discharge from which the plaintiffs could not deviate without discharging all the shippers from liability under the clauses. The learned judge also held that there had been prevention by the plaintiffs of performance of the defendants' obligations as to the discharge of the ship by the issue to different shippers of bills of lading stipulating for discharge within different periods of time. The plaintiffs, he said, contracted with one set of defendants to discharge the ship by an earlier date, say October 24, and with another set of defendants that they might keep their goods on board until a later date, say November 2.

The plaintiffs appeal on the ground that the several bills of lading were independent contracts, and that the agreement constituted by acceptance of each parcel of goods on the terms of the relevant bill of lading was an absolute agreement of the individual goods owner in the terms of his bill of lading. For this proposition, counsel relied on the judgments in *Porteus* v. *Watney* (1) and other cases. Generally as to the effect of a bill of lading to bind the goods owner in respect of the terms of carriage of his own parcels of goods, they cited the judgment of Lord Esher in *Budgett* v. *Binnington*. (2) They also insisted, on the authority of the latter decision and upon general legal principles, that the prevention by a shipowner of the performance of the terms of a bill of lading which will discharge the goods owner from liability for demurrage, must be prevention in fact.

Counsel for the defendants supported the several judgments of the learned judge, not only upon the grounds therein stated, but upon others to which I shall briefly refer. Mr. Claughton Scott argued that the alleged agreement for payment in respect of detention of the ship was void for uncertainty, chiefly as to whether " cargo " in clause 1 must

(1) 3 Q. B. D. 223, 534. (2) [1891] 1 Q. B. 35.

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be taken to mean the ship's cargo or the consignment of the individual shipper. He contended also that the shipowners had impliedly covenanted to secure an equal obligation on the part of all shippers as to discharge of cargo and liability as to demurrage, and had shipped the goods upon an implied condition whereby the liability of each shipper and consignee was to be discharged upon failure of the shipowners to perform their implied covenant. He claimed likewise to establish, by means of the marginal clauses, the existence of a scheme of shipment and discharge upon uniform terms, to which all the shippers became parties at the invitation of the shipowners. Mr. Stuart Bevan based the case of the defendants upon an implied condition in the contract of carriage with each shipper, that no other shipper should be placed upon more favourable terms as to discharge.

It was conceded by counsel for the defendants that the finding by the learned judge of prevention by the plaintiffs of performance of the obligations of the defendants in respect of despatch rests wholly upon the alleged inconsistency of the terms contained in the several bills of lading. They pointed out however that each of the defendants, by their respective points of defence, alleged prevention in fact, and they said that the course taken by the learned judge at the trial had led them to refrain from making proof of this allegation in each case, and they asserted their ability to show that a quantity of timber from the *Kaskaskia*, shipped under circumstances already mentioned, was stowed on the hatches of the *Bethlehem Bridge*, and that her due discharge was thereby hindered.

The contention of the defendants that the marginal clauses are void for uncertainty seems to me not to be well founded. I can find no reason in the bills of lading or in the facts for limiting the meaning of the word " cargo " in clause 1 to the parcel of goods of the individual shipper, or for entertaining a doubt that what is designated is the cargo of the ship. Nor did I observe at the hearing any indication that any doubt on this subject had in fact arisen as between the parties.

The allegation of a comprehensive scheme of shipment and

discharge agreed upon by terms which would make the shipowners on the one hand, and the whole body of shippers on the other, participants on mutual terms in one joint undertaking is, in my opinion, not warranted by the facts. No such scheme was ever offered to any of the shippers, and no goods were shipped on the faith of such a scheme. If there are inherent in the several bills of lading terms which bind the shipowners by implication, they must therefore be found in the language of the documents and the nature of the transaction.

In *Porteus* v. *Watney* (1) Lord Esher said with regard to bills of lading which bound the holders to terms of discharge contained in the charterparty under which the ships were employed: "There is no relation whatever between the holders or takers of other bills of lading and any one holder of a bill of lading. They are not co-sureties. When, therefore, it is said we can look at all the bills of lading and then divide the days of demurrage or the lay days between them, we are looking at other bills of lading which cannot be given in evidence. They cannot be received in evidence in an action between the shipowner and the holder of a bill of lading. . . . . Then what is the contract represented by the bill of lading with the conditions in it? . . . . It is that if the ship is not able to discharge the whole of her cargo within the given number of days after she is at the usual place of discharge, the holder of that bill of lading will pay a certain sum for each day beyond those days, however the delay may be caused, unless it is by default of the shipowner." Lord Esher used language of like effect in *Budgett* v. *Binnington*. (2) The fact that the bills of lading here do not incorporate the conditions of a charterparty, but stipulate independently the period of discharge of the ship's cargo to which the shipper is to be bound, does not seem to me to help the defendants. How is it material to their liability that the terms are stated at length in one document, and not incorporated from another by reference? And why is a joint scheme to be inferred from bills of lading which themselves contain the

(1) 3 Q. B. D. 534, 542. (2) [1891] 1 Q. B. 35.

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terms of discharge, and not inferred when the bills of lading incorporate such terms from the charterparty ?

The substantial questions are, whether the terms of the bill of lading in each case are such as to necessitate the implication the learned judge has made, and whether the issue of bills of lading to one shipper stipulating for discharge of the ship within, say, thirty-five days, is a prevention by the shipowner of performance by another shipper of his obligation for payment of demurrage in the event of failure to discharge the ship within, say, ten days.

Whether the Court can, or ought, to imply terms in a contract, and what terms can be or ought to be implied, depends upon well established principles of law. The implication of any covenant or condition is permissible only if it shall appear beyond doubt on the face of the contract that the parties must have intended the suggested covenant or condition to be a term of the contract. *Mackay* v. *Dick* (1) was relied upon for the defendants ; reference can usefully be made also to the judgment of Bowen L.J. in *The Moorcock* (2) and that of Lord Esher in *Hamlyn & Co.* v. *Wood & Co.* (3) There it was said that an implication will be made if the contract cannot otherwise have effect. But in this case the agreement of one shipper for discharge of the ship's cargo in ten days and payment at a specified rate in default, and the independent undertaking of another shipper for discharge in a period now ascertained as thirty-five days and payment at a specified rate in default, were alike taken for the benefit of the plaintiffs, and each, without any implication, can have an effect beneficial to the plaintiffs. I think that no such implications as are contended for by the defendants can be made.

As to the question of prevention of performance, the general rule of law which is applicable has long since been laid down in definite terms. Parke B. stated it in *Holme* v. *Guppy* (4) : " If the party be prevented by the refusal of the other contracting party, from completing the contract within the time

(1) 6 App. Cas. 251, 263.
(2) (1889) 14 P. D. 64.
(3) [1891] 2 Q. B. 488.
(4) (1838) 3 M. & W. 387, 389.

limited, he is not liable in law for the default." Blackburn J. in *Roberts* v. *Bury Commissioners* (1) affirmed the same principle, and, as Lord Blackburn, he applied it in *Mackay* v. *Dick*. (2) The defendants, however, insist upon a wider proposition. Each claims to be released by the act of the plaintiffs in making contracts inconsistent with their contract with that defendant, and it is to this contention that effect has been given in the several judgments. Assuming the alleged total inconsistency of the several contracts, does it of itself discharge the obligations of the defendants? No authority for the affirmative proposition is produced, and there is modern authority of a contrary tendency. In *Howard* v. *Maitland* (3) a decree which established a right of entry upon land previously conveyed with a covenant for quiet enjoyment was held to be, without entry or actual disturbance, no breach of the covenant for quiet enjoyment. The rules of law by which to determine whether acts, inconsistent with a contract, which have been done by one party, suffice to discharge the liability of the other party, were, however, formulated long ago. In Comyns' Digest, under the title Condition (4), the Lord Chief Baron says: "The performance of a condition shall be excused by the obstruction of the obligee; as if a condition be to build a house; and he . . . . hinders his coming upon the land. . . . . But it ought to be an obstruction which disables the performance." Under Covenant (5) the Lord Chief Baron says, "It shall be a breach of covenant, if the covenantor be disabled to perform"; and again, under Condition (6) this: "As if a condition be to enfeoff the feoffor, and he enfeoffs a stranger . . . . or suffers a recovery against him by default, if execution be sued upon it." An act in the law done by a party may no doubt be deemed a prevention by that party of performance by him of his covenant to do some other act in the law; but it must first be proved to create disability. The question here is whether the plaintiffs prevented

(1) (1870) L. R. 5 C. P. 310, 326.
(2) 6 App. Cas. 251, 263.
(3) (1883) 11 Q. B. D. 695.
(4) Condition (L. 6).
(5) Covenant (E. 2).
(6) Condition (M. 2).

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the defendants from performing an agreement for the speedy discharge of a ship. Counsel for the defendants were not able to point out upon the evidence as the case stands any particular wherein the plaintiffs in fact prevented discharge of the *Bethlehem Bridge* at a date earlier than the time of the actual completion of her discharge, or in fact disabled themselves from performing their own part of the contract of affreightment.

I am of opinion that the making by the plaintiffs of contracts with the various defendants and others, which contained different dates for completion of discharge of the *Bethlehem Bridge*, was not in itself a prevention by the plaintiffs of the performance by either set of defendants of that party's own contract, and that the judgment below, for this reason, cannot be sustained.

Application was made on behalf of the defendants for leave to adduce proof of prevention in fact by the plaintiffs of performance of the defendants' obligations as to the discharge of the *Bethlehem Bridge*. I wish they had given below such evidence as they in fact had, but in view of the nature of the discussion which led to their failure to insist on doing this, I think that upon proper terms as to costs, they ought to be allowed to try this question of prevention in fact.

BANKES L.J. In these three actions, tried by Bailhache J., claims were made for demurrage by the owners of a vessel called the *Bethlehem Bridge* against consignees and holders of bills of lading. The vessel had been put up as a general ship at Gothenburg for the conveyance of cargo to this country, and as many as 150 bills of lading had been issued. The defendants disputed their liability upon a point of law as to the construction of the bills of lading and also upon the facts. At the suggestion of the learned judge the action was disposed of upon the point of law without investigating the questions of fact, which, on the view I take of these appeals, have become material.

The point of law which is raised is a novel one, and can be stated quite shortly. It arises under these circumstances :

The majority of the bills of lading had stamped upon them two marginal clauses. The first was in the following terms: "Cargo to be discharged at the rate of 450 tons, 200 standards, per regular working day, with a demurrage of 600*l.* per day payable pro rata freights." The second in these terms: "Time for discharging to count 24 hours after steamer's arrival in Gravesend Road or other road or roadstead as steamer might be ordered by English authorities whether berth or not available, and always irrespective of turn war circumstances customs of the port and charter clauses on the contrary." On some of the bills of lading the second clause was omitted. The effect of the omission was, in those cases, to make the lay days run from the date when the vessel arrived in berth, whereas in the cases in which the second clause was included, the lay days ran from arrival in Gravesend Road.

In the events which happened, the vessel arrived in Gravesend Road some eight days before she got into berth. Under these circumstances the contention for the respondents was that the provision for the discharge of the vessel contained in the first marginal clause was part of a general scheme under which each consignee accepted the obligation to be responsible for the discharge of the whole of the cargo of the vessel within the given time, or to pay his pro rata proportion of the very large sum fixed as the demurrage rate, and that as a consequence of this it followed as a matter of law that the shipowner must include in each bill of lading the same terms in reference to demurrage, in order that each bill of lading holder should be under the same incentive to discharge and under the same liability for not discharging, as every other bill of lading holder. It was further contended that the mere fact that the terms in reference to demurrage were not the same in all the bills of lading, was sufficient of itself to get rid of any obligation to discharge within the agreed time, and that it was quite immaterial to consider whether any of the respondents had been in fact hindered or delayed in the discharge of their cargo owing to some other consignees having by their bills of lading been allowed a longer

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period for discharge than that to which those respondents had agreed.

I am not quite sure as to the ground upon which this contention was based. As a matter of business, it is easy to understand a contention that it would be very convenient to place such a construction as that contended for upon the contracts entered into by the respondents. As a matter of law I find great difficulty in doing so. Mr. Claughton Scott relied as the foundation of his argument upon a passage in Lord Blackburn's speech in *Mackay* v. *Dick* (1) where he says: "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect." He argued, as I understood him, that the making of identical contracts by the shipowners with the cargo owners was something "necessary to be done" in order to carry out the scheme of the discharge of the vessel within the agreed time which was a combined operation. If this argument is to prevail it can only, in my opinion, do so on the ground that a term to that effect must be implied in the contract. Is it necessary, in order to give business efficacy to the contract, that such a term should be implied? I think not. The ordinary rule that, if the performance of the obligation of a contract by the one party is prevented by the action of the other, the former is excused, is in my opinion a sufficient protection to the respondents, and the implication they ask to have introduced into their contracts is too violent to be accepted. On the construction of the contracts which I prefer, if the respondents have been prevented from discharging, or hindered or delayed in the discharge of their goods by the action of any other cargo owner who has been allowed a longer time for discharging than they themselves have, they have their remedy either in a release from their obligation, or in

(1) 6 App. Cas. 251, 263.

damages. On the other hand, why should they be relieved of any liability if the fact be that all the goods in respect of which the longer discharging time has been given, lie at the bottom of the holds, where they cannot possibly interfere with the discharge by the respondents of their goods? I know nothing as to what the facts are, as they were not gone into, but on the question of law as to the interpretation of the contract made by the parties, I find myself unable to agree with the view taken by the learned judge, though I differ from him upon such a point with great hesitation.

I think that the appeal must be allowed with costs, and I agree with the other members of the Court in thinking that the respondents should have the opportunity, if they desire it, of going into the facts upon a further inquiry.

SCRUTTON L.J. These cases raise a novel point in shipping law, under the following circumstances. Mr. Jörgensen, a Norwegian shipowner, had chartered a ship from the United States Shipping Board to proceed from Norway to Gothenburg and thence to London; her discharge was to be in reasonable time, and a demurrage rate was fixed. He then put the ship up as a general ship, and received some 150 parcels of cargo. When the bills of lading on his ordinary form were presented for signature, he stamped on them two clauses which in his interpretation of them imposed an obligation as to demurrage, and a rate of demurrage, much more onerous than the charter obligation. The circumstances under which these clauses were stamped would raise considerable doubt whether they were really part of the contract, but for the fact that the consignees presented the bills of lading and took delivery under them. Owing to the circumstances of the Port of London there was great delay in discharging the ship, and at the rate of 600*l.* a day some 20,000*l.* of demurrage was incurred, for which the shipowner sued the various consignees pro rata to their freight paid. Some at least of the consignees had got their goods out of the ship within their agreed lay days, but the shipowners contended they had agreed to be liable for the complete discharge of the ship,

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and that no fault of his was responsible for the delayed discharge.

Some of the consignees then relied on the defence that the shipowners through Jörgensen, had (1.) made at any rate two contracts with shippers under which the lay days began at a much later date than the date relevant to the other bills of lading; (2.) taken some goods on board on the top of the deck cargo, shipped under a bill of lading by another ship on quite different terms of discharge. They argued that the existence of these contracts without more relieved them from any obligation to pay the named demurrage. They also proposed to prove that what happened under these contracts had in fact prevented compliance with the obligation of discharge. But on this the judge below suggested that it was enough to deal with the possibilities under the contract without investigating what in fact took place, and counsel for the defendants acquiesced in this suggestion or direction. In the result the cases were decided without the knowledge of the facts of discharge, and the judge took the view that the mere existence of contracts of that nature relieved the defendants from their obligation to pay agreed demurrage for delay beyond fixed days, and substituted an obligation to discharge in reasonable time, which the judge held was complied with.

Before considering the reasons for the judgment of the judge below, it occurred to me, though it had not been argued in the Court below, to doubt whether the wording of the clause as to demurrage was clear enough to impose on a consignee the responsibility for the delay by other consignees in discharging other goods than his own. As far as I know, and as counsel could inform me, the cases in which such a startling result has followed have been either cases in which the consignee has been made liable for the provisions of the charter as to demurrage: "He or they paying freight and all other conditions as per charter party," which naturally relate to the whole cargo, or cases like *Straker* v. *Kidd* (1), where the clause ran: "Three working days to discharge

(1) (1878) 3 Q.B.D. 223.

the whole cargo," and clearly covered other goods than the shipper's. I was inclined to think that a shipowner who wanted to make a consignee liable for failure to discharge other people's goods than his own, must do so in very clear terms. The language here was : " (a) Cargo to be discharged at the rate of 450 tons, 200 standards, per regular working day, with a demurrage of 600*l.* per day payable pro rata freights. (b) Time for discharging to count 24 hours after steamer's arrival in Gravesend Road " . . . . and I doubted whether " cargo " might not be limited to the goods shipped by that consignee, just as the charterer's lien for freight was limited to freight on the particular shipper's cargo in *Fry* v. *Chartered Mercantile Bank of India.* (1) But on consideration I do not think this view is sound. " Cargo " is more naturally read as a whole cargo than one shipper's consignment ; the provision of a double rate, tonnage and standard, points to a mixed cargo, and it is difficult to apply the rate to one consignment, in view of the clause determining when lay days are to begin, as time pro rata for all consignments can hardly begin at the same moment. I think the clause is a rather clumsy attempt to carry out the decision in *Porteus* v. *Watney* (2) while modifying the severity which would make each consignee liable for the whole demurrage, though it had been paid already by another consignee. I take it, therefore, that the consignee has primarily made himself liable for the discharge of the whole cargo of other goods by other consignees.

What then is the effect on that obligation of the shipowners making other contracts as to demurrage with other shippers on different terms ? For instance, if with shipper A. of half the cargo the contract is to discharge the ship, that is the whole cargo, by June 1, and with shipper B. of the other half the contract is to discharge the whole cargo by June 10, one can understand that if shipper B., relying on his contract, does not discharge his cargo till June 10, shipper A. may say : " You, the shipowner, by the contract you have made with B. permitting what he has done under

(1) (1866) L. R. 1 C. P. 689. (2) 3 Q. B. D. 223.

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it, have prevented me from fulfilling my contract, and cannot therefore claim demurrage under it." But can shipper A. say, before he knows what will happen under the contract, that its mere existence excuses him, though its actual performance may not prevent him ? For instance, if A.'s contract is " lay days to commence on arrival in roads," and B.'s " lay days to commence on arrival in dock," it may be there is so little difference in time between the two that there is no prevention in fact ; there may be a long interval, and A.'s lay days may expire before B.'s lay days have begun. Is the possibility of this enough to discharge the first shipper ? The defendants contend that it is, and I understand the judge to agree with them.

The obligation of a consignee with fixed lay days, as laid down in *Budgett* v. *Binnington* (1) and by the House of Lords in *Alexander* v. *Aktieselskabet Hansa* (2) is an absolute engagement, unless he is excused by exceptions in the contract, or the impediment arises " through the fault of the shipowner or those for whom he is responsible." This is, I think, merely an example of the old principle that where performance of a term has been rendered impossible by the act of the other party, the party to perform is exonerated from performance. " If a man agrees to do something by a particular day or in default to pay a sum of money as liquidated damages, the other party to the contract must not do anything to prevent him from doing the thing contracted for within the specified time " : *Dodd* v. *Churton* (3) per Chitty L.J. Where this happens the contractor is excused, not only from the delay actually caused, but for all the stipulations as to time and damages, a liability to do the act in a reasonable time being usually substituted. But in my view there must be delay actually caused, though it is possible the contract objected to may be of such a nature that its performance must, not may, cause delay ; in which case the rights can be ascertained before performance. But in this case the appellants desire to allege more, and to say that in a contract of this character

(1) [1891] 1 Q. B. 35. (2) [1920] A. C. 88, 94.
(3) [1897] 1 Q. B. 562, 568.

by which one consignee makes himself liable for the discharge of the whole cargo, including goods of other consignees, there is to be implied a term that the shipowner shall make exactly similar contracts with all other consignees, as a joint scheme of liability. It may be reasonable to make such contracts, but business necessity, not reasonableness, is the essential condition for such an implication. In my view, actual or necessary prevention, not the possibility of prevention arising from different contracts, is the test.

From this point of view it is regrettable that the learned judge stopped the facts as to actual prevention from being investigated. It is quite possible that the presence on the deck cargo of Baynes & Sherborne's transhipped cargo did delay the discharge; it is possible that the different date for commencing the lay days in *Butt & Sons'* case did affect the discharge of their deck cargo and delay the discharge, while there is a third shipper whose dates have not been investigated at all. Some parts of the learned judge's judgment suggests that he is finding prevention or delay as a fact, but he must have failed to remember that he had declined to take evidence on this point.

I should be ready to consider an application by the respondents to have the issue of actual prevention tried, on proper terms as to costs thrown away. I should be the more ready to do this, as I am not aware of any previous case in which a consignee who has in fact discharged his goods within his lay days, as appears to be Butt & Sons' case here, has been held liable for the failure of other consignees to discharge their goods, and I am not favourably impressed with the way in which these clauses were inserted in the bills of lading.

But on the point under appeal I cannot hold that there is an implied term in these bills of lading that all other bills of lading by the ship shall be in exactly the same terms, and that the existence of one or more different bills, without proof of actual or necessary prevention of discharge thereunder, is sufficient to defeat the claim for demurrage. A judgment for the consignees based on this ground must be

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set aside, but as I have said, I am ready to consider the question of the trial of the issue as to actual prevention on proper terms as to costs.

BANKES L.J. The appeal will be allowed with costs. If the respondents elect to accept the offer of a further hearing the costs of the first hearing will be paid by the respondents in any event; the rest of the costs to abide the event of the second hearing. That will be on the pleadings in those actions. If the respondents do not desire a further hearing the appellants will have the costs below.

Appeal allowed.

Solicitors for appellants: *Thomas Cooper & Co.*
Solicitors for respondents: *Trinder, Capron, Kekewich & Co.*

W. H. G.

1923 *June* 12.

ALIANZA COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Corporation Profits Tax—British Company resident in England—Trade wholly carried on Abroad by a Local Board of Directors—Liability of Company to Tax—Finance Act, 1920 (10 & 11 *Geo.* 5, *c.* 18), *ss.* 52, 53.

Corporation profits tax is imposed by s. 52 of the Finance Act, 1920, upon (inter alia) "the profits of a British company carrying on any trade or business" without any limitation as to where the trade or business is carried on, and therefore the tax is leviable upon the whole of the profits of a British company which carries on a trade or business wholly outside the United Kingdom, although the company is not liable to be assessed to income tax under Case 1 of Sch. D upon the profits of the trade or business.

The operation of s. 52, which imposes the tax, is not in any way limited or affected by s. 53, sub-s. 2, which is a mere computation section.

CASE stated under the Finance Act, 1920, s. 56, sub-s. 6, and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court.

At a meeting of the Commissioners held on March 9, 1922, the Alianza Company, Ld. (hereinafter called the "appellant

company "), appealed against an assessment to corporation profits tax in the sum of 42,850*l.* for the accounting period of twelve months ending December 31, 1920, made upon the appellant company by the Commissioners of Inland Revenue under the provisions of the Finance Act, 1920, Part V.

The appellant company was a limited company incorporated in England under the Companies Acts, 1862 to 1900, on June 17, 1903, with the following objects (inter alia) :—

"(*a*) To acquire and take over, as a going concern, the undertaking and business of the Alianza Co., Ld. (incorporated in 1895), and all or any the assets and liabilities of that company, and with a view thereto to enter into and carry into effect, with or without modification, an agreement already prepared and intended to bear even date with these presents and to be made between the Alianza Co., Ld. (incorporated in the year 1895), and Herbert Pemberton Leach, the liquidator of such company, of the one part and this company of the other part."

"(*b*) To carry on the business of manufacturers and exporters of and dealers in nitrates, iodine, and other products, carriers by land and water, shipowners, warehousemen, wharfingers, bargeowners, lightermen, forwarding agents, underwriters and insurers of ships, goods and other property, or any one or more of such businesses in all or any of their respective branches."

A copy of the Memorandum and Articles of Association of the appellant company together with copies of special resolutions modifying the Articles of Association was attached to and formed part of the case.

The appellant company took over and continued to carry on the business formerly carried on by the Alianza Company, Ld. (incorporated in 1895), which is described in the case of *Alianza Co.* v. *Bell* (1), wherein it was decided that a deduction claimed in respect of the exhaustion of the deposits from which nitrates and iodine were produced was not allowable for the purposes of income tax. The appellant company

(1) [1906] A. C. 18; 5 Tax Cas. 60, 172.

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was controlled in England, and was assessed to income tax in respect of the whole of its profits under Case 1 of Sch. D, without any deduction in respect of the exhaustion of its deposits, until 1918, when its Articles of Association and methods of procedure were altered so as to remove the control from the United Kingdom and localize it in Chile. Among other changes, the following Articles were introduced by a special resolution passed on September 19, 1918, and confirmed on October 10, 1918 :—

" 83A. The Chilian business of the company (which expression in these Articles means and includes all the company's business and affairs whatsoever in the Republic of Chili or elsewhere in South America inclusive amongst other things of the business of carrying on and working the company's nitrate and other properties and everything connected therewith including the raising and borrowing of moneys and incurring of debts and liabilities winning getting buying selling and supplying nitrate and other goods the hiring employment and supply of labour the payment and discharge of debts and liabilities the keeping of accounts and the doing of all things in any way incidental to such business or the management thereof) shall be carried on and managed by a local board and that to the exclusion of the board of directors in the United Kingdom or any other board of directors of the company and such local board shall be wholly independent of any other board or directors of the company and of general meetings of the company (not being general meetings held in the Republic of Chili) and in no way under the control or influence or subject to any resolutions or directions thereof. Only general meetings of the company held in Chili shall (to the exclusion of general meetings held elsewhere) be competent to pass any resolutions binding on or affecting the local board or on any member thereof or having any binding force upon or in regard to the business or affairs of the company in Chili or elsewhere in South America. The local board shall meet only in Chili or elsewhere in South America."

" 83B. The local board shall consist of not less than three

and not more than seven persons to be from time to time appointed by resolution of a general meeting of the company held in Chili and every member of the local board shall ipso facto vacate office if and when he is requested by a resolution of a general meeting held as aforesaid to resign. . . . . "

" 83D. The Chilian business shall be under the control of the local board (to the exclusion of any other board of directors of the company) and the local board may in relation thereto exercise all such powers of the company as the local board in their opinion think requisite for the purpose of working developing and dealing with the Chilian business and the profits of the Chilian business shall be from time to time ascertained as and when the directors consider expedient and unless and until and except as otherwise directed by the directors the local board shall retain in Chili the profits of the Chilian business and shall remit to England such sums only as shall be necessary to enable dividends payable to persons in the United Kingdom to be paid or as may be specifically and specially required by the London board to be transmitted to London for expenses of the company incurred by that board in London. Dividends to persons outside the United Kingdom shall be satisfied out of profits retained in Chili and sufficient profits to pay any dividends from time to time declared which are payable to persons outside the United Kingdom shall be retained in Chili and that notwithstanding any direction from the directors. The powers of clauses 84, 85 and 86 of these Articles shall only be exercisable after consultation with and subject to the approval of the local board."

Since January 1, 1919, on and from which date the local board was constituted and empowered to act, the Chilian business, which included all the manufacturing and trading operations of the appellant company, had been carried on by and had been exclusively under the control of the local board in Chile. The appellant company was a member of an association, called the Nitrate Producers' Association, domiciled in Valparaiso. All the nitrate products of the appellant company and of the other members of the association were

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placed for disposal in the hands of this association, which negotiated for the sale throughout the world of the total fund of nitrate products and apportioned the contracts for sale among its members in proportion to the productive capacity of the nitrate grounds and machinery of the different members. The contracts were completed by the delivery of the quantity of nitrate specified and the collection of the purchase price thereof by the respective members of the association. All the purchasers either themselves resided or had agents resident in Chile, and all sales and payments were effected in that country. Iodine, which is a by-product of the nitrate beds, was disposed of under a similar arrangement through an association called the Iodine Directorate, the only substantial difference being that as regards iodine the proceeds of sales were collected and distributed by the directorate. In the case of the appellant company the production and delivery of the nitrate and iodine and the receipt of the purchase price were in the hands of the local board in Chile. The whole of the profits were retained in Chile excepting the amounts required for payment of dividends to the shareholders in the United Kingdom. The local board had the sole right to declare dividends, to call general meetings of the company, and to fix the date and place thereof. All general meetings of the company since January 1, 1919, had in fact been held in Valparaiso. The accounts had been audited and published by the local board in Valparaiso. A copy of the report and accounts for the year ended December 31, 1920, was attached to and formed part of the case. Those accounts covered all the operations of the appellant company in that year.

The appellant company had its registered office at Dashwood House in the City of London, where its secretary carried on his duties, registers of shareholders in the United Kingdom were kept, transfers of shares held by the shareholders in the United Kingdom were effected, and dividends to shareholders in the United Kingdom were paid.

It was admitted that since January 1, 1919, the head and seat and controlling power of the appellant company had been

situate in Chile; that the facts were not distinguishable from those dealt with in the case of the *Egyptian Hotels, Ld.* v. *Mitchell* (1), and that in view of the decision in that case the profits and gains of the appellant company were not assessable to income tax under Case 1 of Sch. D.

It was contended on behalf of the appellant company: (*a*) that according to the principles on which the profits and gains of the trade so carried on by the local board would be determined for the purposes of Sch. D the said trade was not carried on by the appellant company, and the appellant company was not carrying on any trade or business or any undertaking of a similar character; (*b*) that upon the principles on which the profits and gains of a trade would be determined for the purposes of Sch. D of the Income Tax Acts as interpreted in the case of the *Egyptian Hotels, Ld.* v. *Mitchell* (1) the profits arising from the trade carried on by the local board in Chile must be excluded; and (*c*) that the appellant company was not assessable to corporation profits tax, and if it were assessable it had no profits assessable to corporation profits tax, and the assessment ought to be discharged.

It was contended on behalf of the Crown (inter alia): (*a*) that the appellant company was a British company carrying on the trade or business of manufacturers and exporters of and dealers in nitrate and nitrate products; (*b*) that the whole of the appellant company's profits were accordingly assessable to corporation profits tax for the accounting period in question; (*c*) that the assessment had been rightly made and ought to be confirmed.

The Commissioners, who heard the appeal, were satisfied that the appellant company was a British company carrying on a trade or business through its local board in Chile, and they considered that though the profits of that trade or business were not assessable to income tax under Sch. D because the trade or business was carried on wholly outside the United Kingdom they were chargeable to corporation profits tax, and that for the purpose of assessment to that tax they must

(1) [1915] A. C. 1022; 6 Tax Cas. 152, 542.

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be determined on the same principles on which the profits of a trade carried on wholly or in part in the United Kingdom would be determined for the purpose of assessment to income tax under Case 1 of Sch. D. It was not disputed that upon this view the liability had been correctly computed as a matter of figures, and the Commissioners accordingly confirmed the assessment.

The appellant company immediately upon the determination of the appeal declared its dissatisfaction therewith as being erroneous in point of law and in due course required the Commissioners to state a case for the opinion of the High Court, which case the Commissioners stated and signed accordingly.

Edwardes Jones and *Hildesley* for the appellant company. The Finance Act, 1920, by s. 52, sub-s. 1, imposed a duty called "corporation profits tax," upon "all profits being profits to which this Part of this Act applies." Sub-s. 2 provides that "the profits to which this Part of this Act applies are, subject as hereinafter provided, the following, that is to say: (*a*) the profits of a British company carrying on any trade or business, or any undertaking of a similar character, including the holding of investments. . . . ." Sub-s. 3 defines a "British company "as meaning "any company incorporated by or under the laws of the United Kingdom." Sect. 53, sub-s. 2, provides that "profits shall be the profits and gains determined on the same principles as those on which the profits and gains of a trade would be determined for the purposes of Sch. D set out in the First Schedule to the Income Tax Act, 1918, as amended by any subsequent enactment, whether the profits are assessable to income tax under that schedule or not." The purposes of Sch. D are the assessment of profits to income tax which come within that Schedule and those must be the purposes which were intended in this section. The section does not say "whether the profits are assessable to income tax or not" but "whether the profits are assessable to income tax under that schedule or not." What the section means is that corporation profits tax is

assessable not on the profits of carrying on a trade but on the assessment. The profits and gains of the trade have to be determined according to the terms of Sch. D and they have to be included whether they are assessable under Schs. A, B, C or D. Owing to the alteration in the Articles of the appellant company and to the change in the control of the company it ceased to be assessable to income tax under Case 1 of Sch. D. That Schedule imposes income tax upon the annual profits or gains arising or accruing to any person residing in the United Kingdom from any trade, whether carried on in the United Kingdom or elsewhere. As therefore the company is not assessable to income tax it must be because according to the principles laid down in *Colquhoun* v. *Brooks* (1) and *Egyptian Hotels, Ld.* v. *Mitchell* (2) it must be regarded for the purposes of Sch. D as not carrying on a trade or business, but as being the owners of a foreign possession. The appellant company does not carry on any trade or business within the terms of s. 52 of the Act of 1920; the trade carried on by the local board of the appellant company in Chile is not carried on by the appellant company nor for or on behalf of the appellant company, but is carried on by the local board acting independently of the appellant company. A decision that the local board is carrying on the trade as agents for or on behalf of the appellant company would be inconsistent with the decision of the House of Lords in *Egyptian Hotels, Ld.* v. *Mitchell.* (2) According to the principles on which the profits and gains of the trade as carried on by the local board would be determined for the purposes of Sch. D the profits of the trade are not under s. 53 profits of the appellant company for the purposes of corporation profits tax. The profits of the appellant company for the purposes of the corporation profits tax are therefore nil.

R. P. Hills (*Sir Douglas Hogg A.-G.* with him) for the Crown. The fact that the appellant company had an independent local board to carry on the trade in Chile does not prevent the trade being carried on by the company, the local board being merely agents for the company and *Egyptian Hotels, Ld.* v.

(1) (1889) 14 App. Cas. 493; 2 Tax Cas. 490. (2) [1915] A. C. 1022.

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Mitchell (1) is not an authority to the contrary effect. The company carry on the trade, but it is not carried on in the United Kingdom. The Finance Act, 1920, by s. 52, sub-s. 1, charges the duty on all profits; it is not in the first instance a charge on persons. The profits to which the Act applies are defined in sub-s. 2 (*a*) as "the profits of a British company carrying on any trade or business." There is no limitation in that sub-section as to where the trade or business is carried on. In the case of "the profits of a foreign company carrying on in the United Kingdom any trade or business" a limitation is introduced in sub-s. 2 (*b*)—namely, "so far as those profits arise in the United Kingdom."

The profits which are sought to be brought in charge in the present case are the profits of the appellant company, which admittedly is a British company. Sect. 53, which is relied upon by the appellant company as laying down the principles as to what profits are brought into charge, is really only a provision for arriving at the quantum of the profits. Sub-s. 2 says that the profits shall be determined on the same principles as those on which the profits and gains of a trade would be determined under Sch. D of the Income Tax Act, 1918. When one looks at that Schedule it is plain that the profits of a trade are distinguished from income arising from possessions out of the United Kingdom and that they are charged under Case 1. Therefore the effect of s. 53, sub-s. 2, is that one must assume that one is dealing with the profits of a trade for income tax purposes and not of a foreign possession. It does not follow because there is a profit which might be a profit from a foreign possession under Sch. D that it must be determined for the purposes of corporation profits tax on the principles applicable to a profit from a foreign possession, because the section says it must be determined on the same principles as those on which the profits of a trade would be determined under Sch. D. In order that the argument for the appellant company should succeed it would be necessary to leave the word "trade" out of that sub-section. The words "whether

(1) [1915] A. C. 1022.

the profits are assessable to income tax under that schedule or not" must mean that the profits are to be determined on the same principles as those on which the profits and gains of a trade would be determined for the purpose of Sch. D, whether they would be assessable as trade profits under Sch. D or not. *Colquhoun* v. *Brooks* (1) is not a decision on the quantifying of profits under Case 1 of Sch. D, but on the point whether the profits of a trade wholly exercised outside the United Kingdom were assessable under Case 1 or Case 5 of Sch. D, and therefore it is not an authority in support of the appellants' contention.

Edwardes Jones replied.

ROWLATT J. In my opinion this appeal is founded upon a misconception. The corporation profits tax is imposed by s. 52, sub-s. 1, of the Finance Act, 1920, "on all profits being profits to which this Part of this Act applies." A definition of "the profits to which this Part of this Act applies" is to be found in sub-s. 2, which says, "The profits to which this Part of this Act applies are, subject as hereinafter provided, the following, that is to say:—(*a*) the profits of a British company carrying on any trade or business. . . . ." Now there is no doubt that the assessment here has been laid on the profits of a British company. Is that company a company carrying on any trade or business? It does in fact conduct extensive nitrate works, and trades in nitrate in Chile, and it does all its business there. The local board of the company in Chile are completely independent of any other board or directors of the company, and the London office only exists for the purpose of registration, and the payment of English dividends. Now stopping there, there is not the least question that the company carries on a trade, although it carries it on elsewhere than in the United Kingdom. But it is said that for the purpose of the Income Tax Acts that is not carrying on a trade at all; it is holding a foreign possession. I cannot however find any reference in sub-s. 2 of s. 52 to the Income Tax Acts at all. There is

(1) 14 App. Cas. 493.

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none. And I do not see that *Colquhoun* v. *Brooks* (1) and *Egyptian Hotels Ld.* v. *Mitchell* (2) help us at all on the construction of s. 52, sub-s. 2, of the Act of 1920, because those cases do not say that what this company is doing and what Mr. Brooks did and what the Egyptian Hotels Co. did is not according to the ordinary meaning of the English language carrying on a trade. What those cases decided was that the trade which was being carried on was not a trade which is chargeable to income tax under Case 1 of Sch. D, because it is apparent when one examines the Income Tax Acts that the trade mentioned in Case 1 must be a trade carried on either wholly in the United Kingdom, or partly in the United Kingdom and partly elsewhere, a trade exclusively carried on abroad, being specially dealt with under another case—namely, Case 5. So I fail to see how on the construction of s. 52, sub-s. 2, there can be any difficulty in applying the principle which has been applied here.

When one turns to s. 53, sub-s. 2, it is obvious that that section is a mere computation section, and although the word "principle" is used in defining how profits and gains are to be determined it is only a principle of computation. The section merely provides that in determining the amount of the profits of a company for the purpose of corporation profits tax the same principles must be applied as would be applied in determining the profits and gains of a trade under Sch. D irrespective of whether it would be assessed under Sch. D, or whether it would not. As I have already said this sub-section seems to me a mere computation section and cannot limit or affect the operation of s. 52, sub-s. 2. I think therefore that the appeal fails.

Solicitors for appellant Company: *Dale & Co.*
Solicitor for Commissioners: *Solicitor of Inland Revenue.*

(1) 14 App. Cas. 493. (2) [1915] A. C. 1022.

R. F. S.

[IN THE COURT OF APPEAL.]

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June 29.

In re THE RAILWAYS ACT, 1921.

In re THE ABSORPTION OF THE LEE-ON-THE-SOLENT RAILWAY COMPANY BY THE SOUTHERN RAILWAY COMPANY.

Railway—Absorption Scheme—Absorption of Subsidiary Company—Liabilities of Subsidiary Company exceeding Value of its Undertaking and Property—Whether all Liabilities of Subsidiary Company, including Liability for Debts, to be transferred to Amalgamated Company—Railways Clauses Act, 1863 (26 & 27 *Vict. c.* 92), *Part V.—Railways Act*, 1921 (11 & 12 *Geo.* 5, *c.* 55), *s.* 5, *sub-s.* (*a*).

By the Railways Act, 1921, s. 5: "An absorption scheme under this Act—

(*a*) shall provide in such manner as appears necessary or expedient for the transfer to the amalgamated company of all the property, rights, powers, duties, and liabilities, whether statutory or otherwise, of any subsidiary company to which the scheme relates . . . .":—

Held, on the construction of the sub-section read in combination with the relevant sections of the Railways Clauses Act, 1863, that all the liabilities of an absorbed company, including its liability for debts, must be transferred to the absorbing company, and that the discretion of the Commissioners of Railways Amalgamation Tribunal under the sub-section only extended to framing suitable provisions prescribing the manner of such transfer;—

Where therefore on a case stated by the tribunal under sub-s. 7 of s. 9 of the Act of 1921 with reference to the terms and conditions of the transfer of the undertaking and property of the L. company to the S. company under an absorption scheme it appeared that the debts and liabilities of the L. company would probably exceed the value of its undertaking and property:—

Held, that the tribunal were bound to include in the scheme provisions under which all the debts of the L. company would become payable by the S. company even though the amount of such debts might exceed the value of the undertaking and property of the L. company.

APPEAL from a decision of the Commissioners of the Railways Amalgamation Tribunal (hereinafter called "the tribunal") upon a special case stated by them under the provisions of sub-s. 7 of s. 9 of the Railways Act, 1921.

The Southern Railway Company (hereinafter called the "Southern Company") was incorporated by the Railways

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(Southern Group) Amalgamation Scheme, 1922, which was confirmed by the tribunal on December 22, 1922, for the amalgamation of the London and South Western Railway Company, the London, Brighton and South Coast Railway Company, the South Eastern Railway Company, the London, Chatham and Dover Railway Company, and the South Eastern and Chatham Railway Companies Managing Committee, and the Southern Company was the Amalgamated Company of the Southern Group of Railways for the purposes of Part I. of the Railways Act, 1921.

The Lee-on-the-Solent Railway Company (hereinafter called "the Lee Company") was a subsidiary company in the Southern Group of Railways, and it was now the duty of the tribunal under sub-s. 3 of s. 4 of the Railways Act, 1921, to prepare and settle a scheme for the absorption of the Lee Company by the Southern Company.

An inquiry was held by the tribunal on May 16, 1923, for the purpose of considering the terms and conditions of the transfer of the undertaking of the Lee Company to the Southern Company under such absorption scheme.

For the purposes of such inquiry an agreed statement of facts was placed before the tribunal by the Southern Company and the Lee Company, from which it appeared that the liabilities of the Lee Company on December 31, 1922, amounted to 14,611*l.* 9*s.* 7*d.*, the particulars of which were set out in the case.

It was contended before the tribunal on behalf of the Lee Company (amongst other things) that the absorption scheme should not and could not vary the terms of the Railways Clauses Act, 1863, and the Railways Act, 1921, and that by reason of the provisions of those Acts the absorption scheme ought to provide that the debts of the Lee Company should be transferred to and become payable by the Southern Company, whether or not the value of the undertaking equalled the amount of such debts. And it was further contended that since the debts and liabilities of the Lee Company amounted on December 31, 1922, to the sum of 14,611*l.* 9*s.* 7*d.*, that company would be entitled to such a sum of money

(or its equivalent in stock of the Southern Company) as represented the amount (if any) by which the value of the undertaking exceeded the amount of such debts and liabilities.

On behalf of the Southern Company it was contended (amongst other things) that the effect of the Railways Act, 1921, had been entirely misconceived by the Lee Company and that there was nothing in that Act which could compel the tribunal to provide for a consideration to be given to the Lee Company which would exceed the value of the undertaking of that company when properly ascertained in accordance with the terms of s. 6 of the Act. It was further contended that the undertaking of the Lee Company as a separate company on a net revenue-earning basis had no value, and that the absorption scheme should provide that the Southern Company should pay by way of consideration an amount equal to the break-up value of the undertaking (whatever it might be) without becoming liable for the payment of any liabilities of the Lee Company, and that the Lee Company should provide for the payment out of such consideration of its debts incurred up to the date of vesting and its costs in connection with the scheme and winding up of its affairs.

The tribunal expressed the following opinion: "Reading s. 5 of the Railways Act, 1921, in combination with the relevant sections of the Railways Clauses Act, 1863, we are compelled to conclude that all the liabilities of an absorbed company including the liability for debts must be transferred to the absorbing company, and that the discretion of the tribunal under s. 5, sub-s. (*a*), of the Act only extends to the framing of suitable provisions prescribing the manner of such transfer. This may lead in some cases to results which we cannot regard as equitable, since creditors of an insolvent railway company with no prospect of being paid may by the transfer be placed in such a position that their claims, whatever they may prove to be, have to be met by a perfectly solvent absorbing company, but this consideration does not justify us in modifying what we consider to be the plain meaning of the words of the Acts. We do not of course

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express any opinion as to the validity of the debts of the Lee-on-the-Solent Company as set out in the statement submitted by the company."

The question to be determined by the Court was : " Whether the tribunal is at liberty to provide by the absorption scheme that the Southern Railway shall not be liable for the debts of the Lee Company or on the contrary is bound to include in the scheme provisions under which all the debts of the Lee Company will become payable by the Southern Company, even though the amount of such debts may exceed the value of the undertaking and property of the Lee Company."

Sir John Simon K.C., *Tomlin K.C.* and *H. C. Bischoff* for the Southern Railway.

F. G. Thomas K.C. and *F. J. Wrottesley* for the Lee Company.

The arguments sufficiently appear from the special case and the judgments. Reference was made to the following : Railways Clauses Act, 1863, ss. 38, 55 ; Railways Act, 1921, s. 1 ; s. 2, sub-s. 3 ; s. 4 ; s. 5, sub-ss. (*a*) (*c*) and (*d*) ; s. 6 ; s. 7, sub-s. 3 ; s. 9, sub-s. 7 ; ss. 36, 37, 38, 40 ; Sch. I. ; *Gardner* v. *London, Chatham and Dover Ry. Co.* (No. 1) (1) ; *Attree* v. *Hawe* (2) ; *In re Bodman.* (3)

LORD STERNDALE M.R. This is an appeal from the Commissioners of the Railways Amalgamation Tribunal who sit to deal with matters arising under the Railways Act, 1921, with reference to the amalgamation of companies and their absorption, when amalgamated with other companies. Under the Act certain companies are called " constituent companies," and they are, speaking roughly, the large companies which are amalgamated, the other companies are spoken of as " subsidiary companies," and they are the companies which are absorbed by the amalgamated companies. The provisions to be contained in amalgamation schemes are stated in s. 3 of the Act. The provisions with regard to absorption schemes are contained,

(1) (1866) L. R. 2 Ch. 201. (2) (1878) 9 Ch. D. 337, 349.
(3) [1891] 3 Ch. 135.

in so far as necessary for the present purpose, in ss. 4, 5 and 6 of the Act. Sect. 4, sub-s. 1, provides: "The constituent companies in any group may, on or before the 1st day of January, 1923, submit to the Minister a scheme or schemes framed in accordance with the provisions of this Act for the absorption by the amalgamated company to be formed by the amalgamation of those constituent companies of the subsidiary companies which, under this Act, are to be absorbed by that amalgamated company, or any of those subsidiary companies, on terms agreed to by the subsidiary companies to which the scheme or schemes may relate." Then (sub-s. 2) the Minister shall refer to the amalgamation tribunal any scheme so submitted to him, and they shall, under certain circumstances, confirm the scheme. By sub-s. 3, "If the constituent companies in any group fail on or before the said date to submit one or more agreed schemes framed in accordance with the provisions of this Act for the absorption of all the subsidiary companies which are to be absorbed by the amalgamated company to be formed by the amalgamation of those constituent companies, a scheme for the absorption of any subsidiary company with respect to which an agreed absorption scheme framed in accordance with the provisions of this Act has not been made shall be prepared and settled in accordance with this Act by the amalgamation tribunal." These provisions are only preliminary, and the really effective provisions which affect this particular case begin with s. 5.

The matter arises in this way. There is a small railway called the Lee-on-the-Solent Railway which is to be absorbed by the Southern Railway; I do not know the exact financial position of the Lee-on-the-Solent Railway, except that it certainly has not latterly been run at a profit; whether it ever has been I do not know. It owes large sums of money, about 14,000*l.*, the greater portion of that to a gentleman who I think, if I remember right, was the landowner through whose land the railway ran, and probably the promoter of the company, but it does not matter to whom they are owing; they are owing as simple contract debts. The value of the Lee-on-the-Solent Railway is wholly problematical. I

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do not say that the railway is worth nothing, or that it may not be worth an amount equal to the amount of its liabilities. According to the decision of the tribunal these debts are transferred to the Southern Railway Company, and the Southern Railway Company have to pay them in full, and they will get in return for that liability to pay those debts in full, the Lee-on-the-Solent Railway, and its value, whatever it may be. To test what the tribunal do, I think I may take the hypothesis of the Lee-on-the-Solent Railway not being worth anything, or being worth much less than the debts. The Southern Railway Company say it is unjust, and not only unjust, but not in accordance with the Act of Parliament to transfer to them those liabilities in full; that the scheme ought to provide in some way for making the burden of the liabilities that are cast upon them by the scheme bear a proper relation to what they are going to get by taking over the undertaking of the Lee-on-the-Solent Railway. The Lee-on-the-Solent Railway, on the other hand, say that by the Act of Parliament the Southern Railway has to take them over, whatever the consequences may be; and which of these contentions is correct is really the point we have to decide.

Now, to my mind the case depends entirely on the construction of s. 5, sub-s. (*a*), of the Act of 1921, which is in these terms: "An absorption scheme under this Act— (*a*) shall provide in such manner as appears necessary or expedient for the transfer to the amalgamated company of all the property, rights, powers, duties, and liabilities, whether statutory or otherwise, of any subsidiary company to which the scheme relates; and (*b*) shall provide for the consideration to be given to the subsidiary company or companies, and generally as to the terms and conditions of the transfer, and may provide for the consideration consisting in whole or in part of the securities of the amalgamated company"; that is to say, sub-s. (*b*) provides that instead of paying the consideration in cash, the amalgamated company may pay it in their own securities, which I take it means shares or possibly debentures. Then sub-s. (*c*) "shall provide for the winding up of the subsidiary company or companies, and may provide

on any such winding up for the holder of any securities of the subsidiary company receiving in substitution therefor and in satisfaction of all claims arising thereunder such securities of the amalgamated company forming part of the consideration for the transfer of the undertaking, and of such amounts, as may be specified in the scheme." Then sub-s. (*d*) " shall incorporate the provisions of Part V. of the Railways Clauses Act, 1863, subject to the provisions of this Act." The rest of the section I do not think is relevant. What does that section mean ? On the face of it, it does not seem very difficult to say ; it says, the scheme shall provide in such manner as appears necessary or expedient for the transfer of all the liabilities—I leave out the other words—of any subsidiary company to the amalgamated company. Now, what is the meaning of the expression " liabilities " ; does it include debts ? I should have thought it was almost too plain for argument that it does, if the contrary had not been argued with great ingenuity and ability. It seems to me quite clear that in the amalgamation section, where it is provided by s. 3, sub-s. 1 (*a*), that an amalgamation scheme shall " make such provisions as appear necessary or expedient with regard to . . . . the vesting of the property, rights, powers, duties, and liabilities, whether statutory or otherwise, of the constituent companies," there can be no question it must include all the liabilities. I can see no reason whatever for saying that in s. 5, sub-s. (*a*), it does not mean all the liabilities. The sub-section says " all the liabilities," and why it should not mean it when it says so, I do not know. I do not know what the dividing line is that is proposed between the liabilities that are included and those that are not. Something was said in argument about statutory liabilities. I said when that was suggested to us that " liabilities statutory or otherwise " were clearly not confined to statutory liabilities or any liabilities arising out of any statutory obligations. The case put in argument was : A liability if it existed for damages for injury to a passenger existing at the time of absorption, but not determined, is that transferred or not ? It was only faintly suggested that it was not. Now if that be included

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in the word "liabilities," what is there to say that liabilities in contract are not to be included just as much as liabilities in tort? The only answer that I heard given was this, that a liability in tort such as I have mentioned was something that would be arising out of the statutory undertaking. It does not do anything of the sort to my mind. It arises in this sense and in this sense only out of the statutory undertaking, that if the company was not carrying on the business of a railway, which they can only do by statute, the claim as to damages would never have arisen; but equally, if the company had not been carrying on the business of a railway, which they can only do by statute, these simple contract debts would not have arisen either, because they have arisen in consequence of and by reason of there being a railway; I can see no way of excluding from the word "liabilities" anything that is in the nature of a simple contract debt or anything which is undoubtedly included in the word "liabilities" in all the Acts of Parliament, when there is a transfer of an undertaking from one company to another. If that be so, what is there that can authorize a scheme that does not transfer all the liabilities, irrespective altogether of what the transferee is getting by the absorption of the other company? The only words that can possibly be said to carry that are, "in such manner as appears necessary or expedient," and that, it seems to me, if the argument be sound must be read as meaning in such manner and to such extent as may be necessary or expedient. How you can provide to such extent as may be necessary or expedient for the transfer of all the liabilities I do not know; but I do not know that the word "all" adds very much itself; it is enough to say that, in my opinion, that provides only for the way in which the thing is to be carried out; it gives a discretion to the tribunal as to the terms of the scheme, it is subject to the approval of the tribunal as to the way in which they are to carry out the things that they have to do here, and it does not give them any discretion as to what they have to do. What they have to do is to provide for the transfer to the amalgamated company of all the liabilities of

the subsidiary company. That is what the tribunal have decided and that I think is right, and in my opinion that is the only question we have to decide. We have had some very ingenious arguments put before us as to what would happen if "liabilities" does not include debts. As I think it does most obviously include debts, I do not think it is necessary to deal with the argument based on an assumption that it does not include debts.

A very strong argument was adduced before us that the result of this decision is to put secured creditors in a worse position than unsecured creditors. I rather think there is a fallacy lurking in stating it in that broad way. It does do this, perhaps, it puts the creditors of the company in a better position as to payment than the holders of securities of the company, but that is not using "creditors" in the ordinary sense of the word. Sub-s. (*b*) of s. 5 provides that the payment to the subsidiary company may be partly in securities of the amalgamated company, that is using "securities" perhaps not in the most strict sense, but in a sense in which it is often used when one speaks of holders of securities of the company, and sub-s. (*c*) provides that in the winding up the holders of the securities of the subsidiary company may receive and be given in satisfaction of their claim an equivalent amount of the securities of the amalgamated company. That is simply for that class of secured creditors, the holders of securities; it is not intended, no doubt, to be a fallacy, but it is a fallacy to speak of them as if they were secured creditors in the ordinary sense. It is said that under the Railways Clauses Act of 1863, s. 40, there is a substantive provision as to debts; that is correct, there is. Sect. 38 of that Act provides that in the case of an amalgamation it shall have this effect, that all the property and rights of the amalgamated company shall be subject to the contracts, obligations, debts and liabilities of that company becoming vested in the amalgamated company. Then s. 40 deals with the particular class of liabilities—namely, debts; s. 41 deals with another particular class of liabilities—namely, conveyances and contracts; and ss. 42 and 43 deal with liabilities

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arising out of contracts and rights of action. They are not in any way taken out of the general word "liabilities" in s. 38, but are dealt with in a special manner in those three sections.

Now s. 40 is one of the sections which is incorporated by sub-s. (*d*) of s. 5 of the Act of 1921 which I have read: "shall incorporate the provisions of Part V. of the Railways Clauses Act, 1863, subject to the provisions of this Act." Sect. 40 provides: "Except as may be otherwise provided in the special Act, all debts and money due from or to the dissolved company, or any persons on their behalf, shall be payable and paid by or to the amalgamated company." The argument as far as I followed it was this: Under this Act it is otherwise provided, because the absorption is to be done by a scheme; the scheme may provide that the debts shall not be payable by or shall not be transferred to the amalgamated company; the scheme when it is approved becomes scheduled to an Act and is an Act, and therefore becomes the special Act, and therefore it is otherwise provided by the special Act, and therefore the section does not apply. It seems to me the most complete circle you can possibly have, because you cannot start until you interpret s. 5, sub-s. (*a*), and find out whether the scheme can do anything of the kind, and on what I think is the proper construction of s. 5, sub-s. (*a*), the scheme can do nothing of the kind; it cannot deal with the transfer of liabilities except by transferring as is ordered by s. 5, sub-s. (*a*). Sect. 6 was also referred to. I cannot see that that section has any bearing on the matter at all. It merely provides that in order to determine the terms and conditions of the transfer of the undertaking, the amalgamation tribunal are to take into consideration all the circumstances of the case, "and in particular the value on a net revenue earning basis of each of the constituent and subsidiary companies as a separate company, and its value as a component part of the amalgamated company." That is to say, in order to ascertain what you are to pay, and in order to ascertain what you are to do on the absorption, you are to do these particular things. It has no effect on the construction of s. 5, sub-s. (*a*).

I think for these reasons that the decision of the tribunal was right; whether it produces a just result in this particular case or not is a matter with which I do not think I have anything to do. The appeal must therefore be dismissed with costs.

I am told that this case probably governs a great many other cases, and therefore I think that we should allow an appeal to the House of Lords if the appellants wish it, as I have no doubt they do.

WARRINGTON L.J. I am of the same opinion. The matter before the Court is the determination of a question of law stated for the opinion of this Court by the Railways Amalgamation Tribunal under s. 9, sub-s. 7, of the Railways Act, 1921. The question arises in this way: The Railways Amalgamation Tribunal have had imposed upon them by the Act of 1921, in the events which have happened, the duty of preparing and settling the scheme for the absorption by the Southern Railway, that is the amalgamated company now representing the Southern Group referred to in the Act, of the Lee-on-the-Solent Railway Company, one of the subsidiary companies, which under the provisions of the Act, were to be absorbed by the Southern Group. It happens that the Lee-on-the-Solent Railway Company is the owner of a very small line of railway which has never paid its expenses, and in respect of which there are owing by the company certain debts which it is apprehended—I say no more than that, for it has not yet been determined—will exceed the value of the undertaking.

Now under those circumstances, the Southern Railway insisted before the tribunal that the tribunal ought to insert in the scheme a provision excepting the debts of the Lee-on-the-Solent Company from the liabilities which were to be transferred to the amalgamated company. The tribunal were of opinion that they had no power to make that exception and submitted a question of law to this Court in these terms: [His Lordship read the question and continued:]

Now the question turns, to my mind, entirely on the construction of s. 5, sub-s. (*a*), of the Act of 1921. That enacts

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that an absorption scheme "shall provide in such manner as appears necessary or expedient for the transfer to the amalgamated company of all the property, rights, powers, duties, and liabilities, whether statutory or otherwise, of any subsidiary company to which the scheme relates"; it imposes upon the tribunal the duty of providing for the transfer, amongst other things, of all the liabilities of the subsidiary company. It is true that the transfer may be made in such manner as appears necessary or expedient, but it is to be made all the same. It is to be a transfer of all the liabilities, and it is said that the expression "liabilities" there does not include debts or moneys due from the subsidiary company. It seems to me quite impossible to come to that conclusion. "Liabilities" is a wide term frequently used as covering all kinds of legal liabilities, and I can see nothing in the Act which even points to the necessity of drawing a distinction between a liability of one kind and a liability of another.

Then with regard to sub-s. (*b*), which imposes upon the tribunal the duty of providing for the consideration to be given to the subsidiary company, and generally as to the terms and conditions of the transfer, that carries the matter no further. The transfer that is referred to in that sub-section is the transfer which has been referred to in the previous sub-section, that is, the transfer of all the liabilities.

With regard to the argument which has been founded on sub-s. (*c*), that the holders of securities even may be in a less favourable position under the scheme than the unsecured creditors, that may be so, but I doubt very much whether the expression "the holder of any securities" does not there mean a person who has his money invested in the subsidiary company in the form either of shares or stock or debentures or debenture stock; I doubt whether that expression is intended to include any ordinary creditor who happens to have a lien or some other security upon part of the property of the company; but even if it does, I think the answer to an argument founded on that section is, that the Legislature has used in sub-s. (*a*) clear terms, the effect of which cannot

be got rid of by pointing out that it results in something unexpected or inconvenient. That is a matter for the Legislature; they could have considered that when the Act was passed. I really think it is unnecessary to say anything more except this, that with regard to s. 40 of the Act of 1863 we get back to the same question exactly, because s. 40 only provides this in effect, that the special Act may modify the provisions of that section, that the debts are to be paid by what I may call the purchasing company; but the special Act in this case will be the scheme, and whether or not the scheme will alter the provisions of s. 40 depends upon whether the tribunal have power to do it, and if they have no power to do it, they cannot go on and approve a special Act which modifies the provisions of s. 40.

On the whole, in my opinion, the question submitted to us by the tribunal ought to be answered in the negative so far as the first part of it is concerned, and in the affirmative so far as the second part of it is concerned. The appeal to us should, therefore, be dismissed.

SCRUTTON L.J. I agree with the judgments that have been delivered, and I only add a few words of my own, because this case is said to affect a number of other cases, and may possibly be taken to a higher Court.

Under the Railways Act of 1921, it was contemplated that the larger railways in England should be amalgamated into four groups, and that these companies should then absorb, or be amalgamated with, a number of smaller companies which were worked by, or were in close connection with the larger companies which were amalgamated, and as regards the absorption provided by the Railways Act, 1921, that absorption scheme should incorporate the provisions of Part V. of the Railways Clauses Act, 1863, subject to the provisions of this Act. Now, when one looks at Part V. of the Act of 1863, one sees that the scheme of that Part is that the amalgamated company should have all the property, expressed in a number of words, of each company that was amalgamated, subject to the contracts, obligations, debts and liabilities of that company, and in more detail it is

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stated in three consecutive sections, ss. 40, 41 and 42, that unless there is a provision in the special Act dealing with the particular case, the debts or moneys due from or to the dissolved company shall be paid to or by the amalgamated company; the obligations under deeds and other documents entered into by the dissolved company shall be undertaken by the amalgamated company, and the causes and rights of action existing against the dissolved company shall be taken over by the amalgamated company. That is a general scheme of transfer of all the obligations which may be expressed in the general words: liabilities of the company that is being dissolved, to the new company, the amalgamated company, which is going to undertake them. When one looks at the Railways Act, 1921, to see what further there is, because the provisions of Part V. of the Railways Clauses Act, 1863, are to be incorporated, subject to the provisions of this Act, one finds that s. 5, sub-s. (*a*), enacts that the scheme shall provide for the transfer of all the property and liabilities. Now it seems to me that sub-section means what it says; it says "all," it means "all," and when it says, "in such manner as appears necessary or expedient," it does not mean to such extent as appears necessary or expedient; in other words, when it says "all," it does not mean, or some if you like; it means all.

It is suggested that the scheme need not transfer all the property, and that in one case it has not done so. I can see that it need not in this way; the amalgamated company is to pay a consideration for the assets it takes over, and I can quite see that the consideration may be calculated or estimated on the basis that the dissolved company retains part of its assets as a part of the consideration paid, and in that sense it may be possible to say that by the scheme all the property does not pass finally to the amalgamated company, because some of it is kept as part of the consideration. In the same way I see that for the purpose of determining the consideration, you must look at every asset and every liability, and if somebody comes to you saying, I have assets of the value of 10,000*l.*, pay me; you may say, yes, my

poor sir, but you have liabilities which I am to take over worth 10,000*l.*, and the result is that I pay you nothing. The casus omissus, if there is one in the Act, is the case of the dissolved company whose liabilities exceed its assets; and where it is not possible for the tribunal to provide adequately in the consideration for the fact that the amalgamated company has to take over all the liabilities and that they are more than the assets. As I ventured to say during the argument, it is a case, as a learned Lord once described it, of where the Legislature provides for the over-plus but not for the under-plus; that means it is a casus omissus. If that is so, we have no power to legislate. All that we can do is to follow what seems to me to be the plain words of the Act, that the scheme must provide for the transfer of all the properties and all the liabilities. I quite appreciate that it is a windfall for the lucky creditors of the Lee-on-the-Solent Company who have had a debt that they would have sold to anybody for a farthing in the £ suddenly to find themselves presented with 20*s.* in the £. That is a matter for the Legislature and not for us. I quite sympathize in some respects with the view of the tribunal, which is that the Act compels them to hold this, but they doubt if it is always equitable. The Court of Appeal has no jurisdiction to settle what is equitable if the plain words of the statute provide for a method which it may or may not think is equitable. The result appears to me to be that the questions asked must be answered by saying that the tribunal are not at liberty to provide by the absorption scheme that the Southern Railway shall not be liable for the debts of the Lee-on-the-Solent Company, but, on the contrary, are bound to include in the scheme some provision under which all the debts of the Lee Company will become payable by the Southern Company, even though the amount of such debts may exceed the value of the undertaking and property of the Lee Company.

Appeal dismissed.

Solicitor for appellants: *W. Bishop.*

Solicitors for respondents: *Blake, Shearman & Co.*

W. I. C.

C.C.A.
1923
June 26;
July 10.

[IN THE COURT OF CRIMINAL APPEAL.]

THE KING *v.* HAMMER.

Criminal Law—Bigamy—Jewish Marriage abroad—Proof of Marriage—"Any action or other matter"—Criminal Prosecution—Administration of Justice Act, 1920 (10 & 11 *Geo.* 5, *c.* 81), *s.* 15.

The validity of a Jewish marriage celebrated in a foreign jurisdiction is a question of fact, and it is not necessary in order to prove such a marriage to produce a written contract.

By s. 15 of the Administration of Justice Act, 1920, "where, for the purpose of disposing of any action or other matter which is being tried by a judge with a jury in any court in England or Wales, it is necessary to ascertain the law of any other country which is applicable to the facts of the case, any question as to the effect of the evidence given with respect to that law shall, instead of being submitted to the jury, be decided by the judge alone":—

Held, that the words "any action or other matter" include a criminal prosecution.

APPEAL from a conviction.

The prisoner was indicted for, and found guilty at the Central Criminal Court of, bigamy, but the learned recorder respited judgment and gave a certificate that the case was a fit one for appeal.

The allegation against the prisoner was that he was married on May 22, 1907, at Lipscani, Bessarabia, at that time within the Empire of Russia, according to the local law then and there governing Jewish marriages (the applicability of which was not in dispute), and that subsequently, and while to his knowledge his wife was alive, he went through the ceremony of marriage in England upon May 5, 1917.

The defence set up at the trial was that the first marriage had not been properly proved, and it was contended that it was necessary in order to prove a Jewish marriage to produce a written contract, and further that there was no evidence of the marriage in the absence of any document purporting to bear the signature of the official Rabbi, or purporting to be endorsed by the municipal authority. The recorder held that it was not necessary to produce a written contract in order to prove a Jewish marriage, and he further held that

the question of foreign law was one for the jury. Experts on Russian law were called on either side. The jury accepted the evidence on behalf of the prosecution that the facts deposed to by them proved that the marriage at Lipscani was a valid one, and it being further proved that the prisoner had gone through the ceremony of marriage in 1917, brought in a verdict of guilty.

The prisoner appealed.

Samuel Duncan for the appellant. In order to prove a Jewish marriage abroad it is necessary to put in evidence the written contract of marriage. It was so held at the Central Criminal Court in *Reg.* v. *Althausen* (1) and *Reg.* v. *Nasillski.* (2) The judges in both those cases held that they were bound by *Horn* v. *Noel* (3), a case before Lord Ellenborough in 1807. In that case the objection was taken that inasmuch as the previous written contract was essential to the validity of a Jewish marriage it ought to be produced and proved. It is true that no decision was given as the defendant acquiesced in the contention and put in the written contract, but that case has been followed for 100 years as an authority. Further in order that the marriage should be a proper legal marriage in Russia it must have been performed before the State-paid Rabbi of the district and have been registered before the burgomaster of the town where it took place: see *Reg.* v. *Weinberg.* (4) The document produced in the present case was not endorsed by the municipal authority, it was merely an extract from a book.

[SANKEY J. The question as to Russian law is one of fact. In the present case there was evidence both ways as to what Russian law is.

SALTER J. What the Russian law is with regard to this matter cannot be laid down in any case in this country once for all. It must be proved in each case.

SANKEY J. Does s. 15 of the Administration of Justice Act, 1920, which provides that the effect of any evidence

(1) (1893) 17 Cox, C. C. 630.
(2) (1897) 61 J. P. 520.
(3) (1807) 1 Camp. 61.
(4) (1898) 33 L. J. Newsp. 239.

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as to foreign law shall be decided by the judge alone and not be submitted to the jury, apply to criminal proceedings ?]

It applies to "any action or other matter which is being tried by a judge with a jury in any Court in England or Wales." "Other matter" includes criminal proceedings, otherwise no effect can be given to those words as they are alternative to "action." The Act further says "in any Court," which includes a criminal proceeding. It would have been easy to say "in any civil Court" if the Legislature had so intended. The Act in some sections refers to particular Courts—namely, to the High Court in s. 2, to the county court in s. 3, to the Admiralty Court in s. 5, and in s. 4 the Act expressly refers to criminal proceedings. The conviction ought to be quashed; the case ought not to be sent back for a new trial as the prisoner was put on his trial on the indictment and was then in peril. In *Crane* v. *Director of Public Prosecutions* (1), where the proceedings were held to be a nullity and a new trial ordered, two prisoners had been tried together whereas they were charged on separate indictments; there had therefore been a mistrial in that case.

F. J. Newman for the Crown. The Administration of Justice Act, 1920, with the exception of s. 4, which deals with grand juries, is not referred to in Archbold's Criminal Pleading, and therefore the editor of that work did not consider the Act as having any application to criminal proceedings. The words "any action or other matter" are used in s. 2 with reference to civil proceedings, and they ought to have the same meaning assigned to them in s. 15. It is clear from the title of the Act and from the Acts that are repealed by it that the Act only purports to deal with civil matters. "Other matter" in s. 15 may refer to divorce and cognate matters. It was never intended to take away by this Act a prisoner's right to have a question as to foreign law decided by a jury. The Central Criminal Court has become by virtue of the Judicature Act, 1873, ss. 16 and 29, a branch of the High Court: see *Rex* v. *Parke*. (2) There is no case which decides that a written contract is necessary for the validity of a Jewish marriage

(1) [1921] 2 A. C. 299. (2) [1903] 2 K. B. 432, 439.

except the cases based upon *Horn* v. *Noel* (1), and that case does not decide anything. Further what it is said to decide is inconsistent with *Lindo* v. *Belisario* (2), where it was held that a written contract was not essential. The prosecution relied upon the evidence of persons who were present at the first marriage in Russia, and therefore it was not necessary to rely upon the documents that were put in: *Rex* v. *Allison alias Wilkinson.* (3) Extracts from foreign registers of marriage are receivable in evidence in the Courts of this country: *Lyell* v. *Kennedy.* (4) The maxim "Omnia præsumuntur rite esse acta" applies to the present case and therefore the first marriage ought to be presumed to be valid: *Reg.* v. *Cresswell.* (5)

S. Duncan replied.

Cur. adv. vult.

July 10. The judgment of the Court (Sankey, Salter and Swift JJ.) was delivered by

SANKEY J. The only point taken by the defence was that the first marriage had not been properly proved, and two contentions were advanced (1.) that it was necessary to produce a written contract proving the alleged marriage; (2.) that there was no evidence of the said marriage fit to be left to the jury in the absence of any document purporting to bear the signature of the official Rabbi, or purporting to be endorsed by the municipal authority. As to the first contention. The learned judge was referred to several cases tried at the Central Criminal Court—namely, *Reg.* v. *Althausen* (6), where the recorder held that the production of a written contract was necessary, and *Reg.* v. *Nasillski* (7), where the Common Serjeant followed the same ruling. Both learned judges founded their decision upon the case of *Horn* v. *Noel* (1), which came before Lord Ellenborough in the year 1807, and the defence contended that Lord Ellenborough decided that the production of a written contract of marriage

(1) 1 Camp. 61.
(2) (1795) 1 Hagg. Cons. 216, 227.
(3) (1806) Russ. & Ry. 109.
(4) (1889) 14 App. Cas. 437, 448.
(5) (1876) 1 Q. B. D. 446.
(6) 17 Cox, C. C. 630.
(7) 61 J. P. 520.

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was necessary to prove a Jewish marriage. We think that this is a misconception. The case in Campbell is not an authority for any such proposition. All that took place there was that the learned counsel, Mr. Garrow, suggested that a written contract ought to be produced, and his opponent said he had it. It was put in, and the case proceeded. No decision was given. In our view the validity of a marriage under Jewish and Russian law is a question of fact, and there was ample evidence upon which the marriage could be held valid, notwithstanding the absence of a written contract.

With regard to the second contention, the learned judge held that the question of foreign law was one for the jury, and experts in Russian law were called on either side. The jury accepted the evidence on behalf of the prosecution that the facts deposed to by them proved that the marriage at Lipscani was a valid one, and it being further proved that the prisoner had gone through the ceremony of marriage in 1917, brought in a verdict of guilty. Unfortunately, the attention of the Court was not called to the Administration of Justice Act, 1920, s. 15, which provides that the question of foreign law shall be decided by the judge. Sect. 15 is as follows: "Where, for the purpose of disposing of any action or other matter which is being tried by a judge with a jury in any court in England or Wales, it is necessary to ascertain the law of any other country which is applicable to the facts of the case, any question as to the effect of the evidence given with respect to that law shall, instead of being submitted to the jury, be decided by the judge alone." It was argued by the Crown, on appeal, that the section did not apply to criminal law, and that a criminal prosecution could not be included in the words "any action or other matter." It was pointed out that these words are used in s. 2 of the Act, which obviously can only refer to civil proceedings, and that the words must have the same meaning in s. 15, and that the latter section therefore could only refer to civil cases. We think that the words as used in s. 15 are wide enough to include, and must be held to include, a criminal prosecution. It will be observed that the Act

itself is entitled the Administration of Justice Act. Sect. 2 refers to matters in the High Court, s. 3 to matters in the county court, s. 5 to matters in the Admiralty Court, s. 9 to the enforcement in the United Kingdom of judgments obtained in superior Courts in other British Dominions. All these sections specifically apply to the subject matter referred to in them. Sect. 15 is in Part III. of the Act under the title "Miscellaneous," and as above pointed out, the words are very wide and general in their character, and we do not think that they can be cut down by reference to similar words used in other parts of the Act with respect to particular subject matters. Nor do we think it possible to construe the words under discussion by reference to meanings assigned to them or to similar words by the Legislature in other and different statutes. For example, it is provided by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100, that "action" means a civil proceeding and shall not include a criminal proceeding by the Crown. Again it has been held that the words "legal proceedings" in the Vexatious Actions Act, 1896 (59 & 60 Vict. c. 51), s. 1, do not include criminal proceedings: see *In re Boaler*. (1) The meaning of the words as used in the Act under discussion must be derived from a consideration of the words themselves, from a consideration of the place they occupy in the statute, and from a consideration of the statute as a whole.

It would be a strange result if in a civil case foreign law was for the judge and in a criminal case for the jury. It is not difficult to postulate circumstances where the same question of foreign law would arise in a matter which was first decided in a civil Court and subsequently came on in a criminal Court, in which event if the construction contended for by the prosecution is correct, in the first of the two cases the foreign law would be for the judge and in the second of the two cases the foreign law would be for the jury. A construction leading to such a result cannot we think be placed upon the section in question. We are therefore of opinion that it was for the judge to decide what the foreign

(1) [1914] 1 K. B. 122.

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law with reference to the alleged marriage at Lipscani was, and he has not done so, but it has been decided by the jury, who had no right to do so. We at first thought that we ought to hold that there had been no trial and that a venire de novo ought to be ordered on the authority of *Crane* v. *Director of Public Prosecutions*. (1) We, however, think that that case is distinguishable on the ground that the prisoner there was never in peril at the first so-called hearing. In the present case the indictment was valid, the prisoner was given in charge to the jury upon it, and was in peril of being convicted thereon; but there was an illegality in the proceedings—namely, that the question of foreign law was not decided by the judge, but was decided by the jury. In these circumstances we feel that we have no alternative but to quash the conviction.

Appeal allowed.
Conviction quashed.

Solicitors for appellant: *Pilgrim & Phillips.*
Solicitor for Crown: *Director of Public Prosecutions.*

(1) [1921] 2 A. C. 299.

R. F. S.

Applied. R. *v.* BARNETT. [1951] 1 All E.R. 917.

[IN THE COURT OF CRIMINAL APPEAL.]

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1923

June 25, 26; *July* 10.

THE KING *v.* KAKELO.

Criminal Law—Indictment—Offence under Aliens Order—Offence punishable on summary Conviction—Aliens Restriction Act, 1914 (4 & 5 *Geo.* 5, *c.* 12), *s.* 1, *sub-ss.* 1, 2, 4—*Aliens Restriction (Amendment) Act*, 1919 (9 & 10 *Geo.* 5, *c.* 92), *s.* 13, *sub-ss.* 1, 4—*Aliens Order*, 1920 (*St. R. & O.*, 1920, *No.* 448), *Art.* 18, (4) (*b*).

On a prosecution for an offence against a statutory Order an objection that the Order has not been proved must be taken before the Court at the trial; it is too late to take the point for the first time on appeal.

In cases under the Aliens Restriction Act, 1914, s. 1, sub-s. 4, and the Aliens Restriction (Amendment) Act, 1919, s. 13, when any question arises whether the person charged is an alien or not, the onus lies upon him to prove that he is not an alien.

Offences against the Aliens Restriction Act, 1914, and the Aliens Restriction (Amendment) Act, 1919, are punishable only in the manner prescribed by the statutes—namely, on summary conviction—unless the person charged with the offence claims the right under s. 17 of the Summary Jurisdiction Act, 1879, to be tried with a jury. Where, therefore, an offence under those Acts was treated by the magistrate as an indictable one and the case sent for trial before quarter sessions without any claim for trial with a jury having been put forward by the prisoner, the conviction at the sessions was quashed.

APPEAL from a conviction at the London Sessions.

The appellant arrived in London from New York in March, 1923, and, describing himself as the Prince of Kurdistan, went first to the Savoy Hotel and then to the Hyde Park Hotel, and stayed several days at each, leaving without paying his bill. He further borrowed money from one of the hotel managers, and hired motor cars without paying for them. Shortly afterwards he was arrested and sent by the magistrate for trial at the London Sessions without any claim having been put forward by him for trial with a jury. He was convicted on five counts of an indictment which charged him with obtaining credit by fraud under the Debtors Act, and with making a false statement contrary to art. 18, (4) (*b*), of the Aliens Order, 1920, and was sentenced to six months' imprisonment in division two, and recommended for deportation.

He applied for leave to appeal against conviction and

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sentence, but in respect of the counts for fraud such leave was refused. He was, however, granted leave to appeal against his conviction for the offence under the Aliens Order.

Caporn and *Russell Vick* for the appellant.

Percival Clarke for the Crown.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

July 10. The judgment of the Court (Sankey, Salter and Swift JJ.) was read by

SANKEY J. [who, after stating the facts, continued:] On the case coming on three points were taken on the appellant's behalf. It was said first that there was no proof given of the Aliens Order itself. Reliance was placed upon *Bennington* v. *Huddleston* (1), recently decided by a Divisional Court. In that case there was a prosecution before the justices under a Motor Car Order, and it was objected at the hearing that there was no proof of the Order itself. The magistrates stated a case on the point. The Court held that the objection being taken in the Court below it was incumbent upon the prosecution to produce the Order, and that, as they had not done so, the case must go back in order to give the prosecution an opportunity of putting themselves in order. We think that case is wholly inapplicable to the present circumstances. In the case now before us no such point was taken by the defendant at the trial. We are of opinion that it is a point which ought to have been taken by him at the trial if he wished to rely upon it. Had it been taken there can be no doubt that the Order would have been forthcoming immediately, or within a very short time. In the circumstances of this case it is too late to take this point for the first time on appeal.

It was contended, secondly, that there was no proof that the appellant was an alien. It was said on his behalf that the allegation that he was an alien was set out in the count

(1) December 15, 1922. Unreported.

of the indictment, and therefore it was incumbent upon the prosecution to prove it. The argument was as follows: It was admitted that by the Aliens Restriction Act, 1914, s. 1, sub-s. 4, in respect of cases under Orders made in pursuance of such Act it was expressly enacted that the proof that the person charged was not an alien was upon the person alleging that he was not an alien, but it was said that the Act only applied during a state of war or during some national emergency; that this was clear from the Aliens Restriction (Amendment) Act of 1919, which did not re-enact s. 1, sub-s. 4, and that therefore the onus remained upon the prosecution to prove that the prisoner was an alien. We think that this point is wholly misconceived. It will be observed that the 1914 Act was not repealed by the 1919 Act; in fact, by the terms of the 1919 Act both Acts are to be read as one. The 1919 Act repealed that part of the 1914 Act which says that the provisions of the Act were only to be applied in case of war or national emergency, but we can nowhere find in the 1919 Act any express provision, or indeed any intention to repeal s. 1, sub-s. 4, of the 1914 Act, and reading the two Acts together we come to the conclusion that that sub-section still remains and has not been repealed. We therefore are of opinion that the onus was upon the appellant to prove that he was not an alien and not upon the prosecution to prove that he was. Further, we think that the burden of proof may in the course of a case be shifted from one side to the other, and in considering the amount of evidence necessary to shift the burden of proof the Court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively: see Stephen's Digest of the Laws of Evidence, 9th ed., art. 96. In this case there was evidence given by the prosecution sufficient to shift the onus of proof and to make it necessary for the prisoner to prove that he was not an alien.

It was contended, thirdly, that the offence under the Aliens Order was punishable by summary conviction, and that sessions had no jurisdiction to entertain the indictment. This depends upon the Aliens Restriction Act, 1914, s. 1,

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sub-s. 2, and the Aliens Restriction (Amendment) Act, 1919, s. 13, sub-s. 4. The law upon the subject is elaborately dealt with in *Reg.* v. *Hall* (1), which was a motion to quash an indictment charging one Hall, an overseer of the poor for the parish of St. Mary, Whitechapel, with a misdemeanour. The motion succeeded upon the ground that an offence by an overseer within the meaning of s. 51 of the Parliamentary Registration Act, 1843, was not an indictable misdemeanour. Charles J. went at length through the cases bearing on the matter and referred to the passage in Hawkins' Pleas of the Crown, Book 2, ch. 25, s. 4, which is as follows : " Where a statute makes a new offence which was no way prohibited by the common law, and appoints a particular manner of proceeding against the offender, as by commitment, or action of debt, or information, etc., without mentioning an indictment, it seems to be settled at this day, that it will not maintain an indictment, because the mentioning the other methods of proceeding only, seems impliedly to exclude that of indictment."

There are certain statutes which while prescribing a summary penalty expressly reserve the right to prosecute by indictment, as for example : The Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 34, and the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2, sub-s. 3. The question for determination here is in which category the statutes under discussion fall. It is to be observed that the remedy by indictment is not specifically preserved either in the Aliens Restriction Act, 1914, or in the Aliens Restriction (Amendment) Act, 1919; while it is enacted by s. 13, sub-s. 1, of the latter Act that a person acting in contravention of the Act shall be guilty of an offence against the Act, and by sub-s. 4 that a person who is guilty of an offence against the Act shall be liable on summary conviction to a fine not exceeding 100*l*. or to imprisonment, with or without hard labour, for a term not exceeding six months. We are of opinion that these statutes fall within the doctrine above quoted, and that all offences against them are only punishable in the

(1) [1891] 1 Q. B. 747, 753.

manner prescribed by the statutes—namely, on summary conviction.

We have not lost sight of the fact that under s. 17 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), it is always open to a person charged before a Court of summary jurisdiction with an offence entailing such a penalty as the offence alleged to have been committed by the defendant in this case, to claim a right to be tried by a jury, a right of which the Court must inform him. In the event of his claiming the right he is triable on indictment before a jury, and so on his own election turns the offence into an indictable one. No such claim was however put forward by the prisoner in this case. The matter was treated as an indictable one before the magistrate and before the sessions. We are of opinion that it was not an indictable offence, and that the conviction at the sessions must be quashed. We do not propose to interfere with the recommendation for deportation which the Court had the right to make upon the conviction of the appellant on the counts of the indictment relating to obtaining credit by fraud, for on a consideration of all the circumstances we think such recommendation should be upheld.

Appeal allowed.

Conviction for an offence against the Aliens Order, 1920, *quashed.*

Solicitors for appellant: *Lloyd, Richardson & Co.*
Solicitors for prosecution: *Wontner & Sons.*

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May 29.

SALTER *v.* LASK. (1)

Landlord and Tenant—Action to recover Possession—Claim for Portion only of demised Premises—Whether Action Maintainable—Statutory Defence not pleaded—Power of County Court Judge to entertain Defence—County Court Rules, 1903, *Order* x., *r.* 18—*Increase of Rent and Mortgage Interest (Restrictions) Rules*, 1920, *r.* 18.

A landlord is entitled to bring an action to recover from a tenant a portion of the demised premises, and is not bound to include in his claim the whole of the premises comprised in the lease.

A defence raised under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, is a statutory defence of which notice should be given under Order x., r. 18, of the County Court Rules, 1903. But where such notice has not been given, the effect of r. 18 of the Rules made under the Act is that if it appears from the evidence that the premises are premises to which the Act applies, the county court judge, before making an order, must satisfy himself that the conditions prescribed by the Act have been fulfilled.

Appeal from the Whitechapel County Court.

The following facts are taken from the judgment of McCardie J. The action was brought by the owner of certain premises against the defendant to recover possession and the learned judge entered judgment for the defendant. The premises in respect of which possession was claimed are No. 5 Bell Lane in the City of London. In 1913 the owner of the premises was a Mr. Lyon: he possessed Nos. 3 and 5 Bell Lane and also a warehouse or workshop situated behind those premises. He demised the whole of the premises to the defendant's husband at a rent of two guineas a week. In 1916 the defendant joined the army, and his wife was substituted for him as tenant. She sublet the warehouse or workshop to a man named Cohen at a rent of 1*l.* a week and she sublet No. 3 Bell Lane to a man named Rich at 17*s.* a week. In 1917 Rich took a lease for 21 years from Mr. Lyon of the whole of the premises subject to the tenancy I have mentioned. Rich thus became the owner of the immediate reversion, and was entitled to a rent of two guineas a week from the defendant or his wife, and he had to pay as sub-tenant 17*s.* a week in respect of the sub-tenancy conferred on him. In February, 1921, notice to

(1) C. A. November 1, 1923. Appeal allowed.

quit was given to Mrs. Lask on the footing that she was a weekly tenant only. A discussion took place with Rich on the matter and Rich accepted the position that Mrs. Lask was a yearly and not a weekly tenant, and on March 23, 1921, he gave her a further notice to quit the whole of the premises —namely, Nos. 3 and 5 Bell Lane and the warehouse. As the result of that notice Mrs. Lask's tenancy was determined in September, 1922. Then in September, 1921, Rich assigned his interest as landlord to the plaintiff, but continued in possession of No. 3 as tenant of the plaintiff. In July, 1922, the plaintiff granted in his own name a tenancy of the warehouse to Cohen, who was already the tenant.

In September, 1922, Mrs. Lask died, and her husband became her administrator. In December, 1922, the present action was commenced against the defendant claiming possession, not of the whole of the premises demised in 1913, but of a part only of those premises—to wit, No. 5 Bell Lane.

Gilbert Beyfus for the plaintiff. Where a tenancy comprises several different premises, and the tenant is in physical possession of one part only, the landlord may sue for possession of that part, and is not bound to include in his action the whole of the premises demised. If the plaintiff in the present case had sued to recover the whole of the premises, he must have failed as against the sub-tenants, Cohen and Rich. The annual value of No. 5 Bell Lane is not more than 100*l*. It is about one-third of that sum. The only possible objection to the plaintiff suing for a part only of the demised premises is met by s. 59 of the County Courts Act, 1888, which empowers a judge of the High Court, if satisfied that the title to lands of greater annual value than 100*l* would be affected by the decision in the action, to order the action to be tried in the High Court.

Phineas Quass for the defendant. The plaintiff made out no case for recovering possession. The action is not maintainable unless it is brought to recover possession of the whole of the premises demised.

[SALTER J. In certain circumstances it would seem that

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a landlord may sue to recover a part of the premises: Foà's Landlord and Tenant, 5th ed., p. 769.]

The cases there referred to do not support that view. The defendant is still the rated occupier of the whole of the premises, and the fact that he is only in physical occupation of one part makes no difference. He is still in possession as tenant of the whole. Further, the defendant was entitled to retain possession under the provisions of the Rent Restrictions Act, 1920. It is not clear that notice of an intention to rely on that Act need be given under Order x, r. 18, of the County Court Rules, 1903. By r. 18 of the rules made under the Act of 1920 where proceedings are taken in the county court for the recovery of possession of premises to which the Act applies, the Court must, before making an order for possession, "satisfy itself that such order may properly be made, regard being had to the provisions of the Act."

Beyfus in reply. When it is shown that the Act applies to the premises, the county court judge must satisfy himself that the order may properly be made, but no question upon the Act was raised.

McCARDIE J. This is an appeal from a decision of the judge of the Whitechapel County Court. [His Lordship stated the facts and continued:] In these somewhat unusual circumstances the action came before the county court judge, and several points were raised before him. First, it was suggested that the county court had no jurisdiction by reason of the provisions of s. 59 of the County Courts Act, 1888, because it was said that the amount at issue was more than 100*l.* a year, as the result of the rent of the whole of the premises in question being two guineas a week. I need only say that s. 59 contains a proviso that if a defendant in a county court action for ejectment satisfies the High Court that the title to lands of greater annual value than 100*l.* is in dispute, he may apply for the transfer of the case to the High Court. In my view there was nothing in the present case which precluded the exercise of jurisdiction by the county court judge, and moreover no application was made by the

defendant under s. 59 for the transfer of the action to the High Court. Then a further point of a novel character was raised by the defendant's counsel. He said that where the original letting had been, as here, of several premises, an action for ejectment could not be maintained unless it included in its ambit the totality of the premises which had been demised, and that it mattered not that the landlord, for good reason, desired to secure possession of a portion of the premises only. That is a novel point, and I gather that the learned judge acceded to the contention because his judgment, in so far as it is in writing, says that he decides that the plaintiff could not eject the defendant from a part only of his estate. With great respect to the learned judge, I am unable to agree with the view expressed by him. There is no authority to be found on the point, but I can see no reason whatever which should compel a landlord, against his will, to include in his action parts of premises which he does not require, under a possible penalty of being defeated in toto. I can therefore see no reason why the plaintiff should not bring an action to recover a part of the premises which he has demised to the defendant. In saying that there is no authority on the point, I should like just to mention the power which the Court has to award a plaintiff a part only of what he claims as indicating the capacity of the tribunal to divide up a plaintiff's claim. Several interesting cases on this point will be found on reference to the well-known treatise of Cole on Ejectment, pp. 85, 285, 306. I need only add that I have considered the passage to which we were referred in Foà on Landlord and Tenant, 5th ed., p. 769, and the cases there cited of *Stolworthy* v. *Powell* (1) and *Bassano* v. *Bradley*. (2) Upon the grounds which I have so far dealt with, I think that the learned judge was wrong in giving judgment for the defendant.

But a question has been raised before us under the Rent Restrictions Act, 1920, and it is said that under the provisions of that Act the defendant was entitled to retain possession. This point raises a question of practice amongst others. The Act of 1920 was not pleaded in the county court, and I take

(1) (1886) 55 L. J. (Q. B.) 228. (2) [1896] 1 Q. B. 645.

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the view that the Act is a statutory defence, and that it falls within Order 10, r. 18, of the County Court Rules, and that therefore prima facie the defendant would not be entitled to raise it unless he had pleaded it. But our attention has been called to r. 18 of the Rules made under the Rent Restriction Act, 1920, which provides that "Where proceedings are taken in the county court for the recovery of rent of any premises to which the Act applies, or of interest on a mortgage to which the Act applies, or for the recovery of possession of any premises to which the Act applies, or for the ejectment of a tenant from any such premises, the Court shall, before making an order for the recovery of such rent or interest, or for the recovery of possession or ejectment, satisfy itself that such order may properly be made, regard being had to the provisions of the Act." Now in my view that rule must be read in conjunction with Order x., r. 18, of the County Court Rules, and I am satisfied that even if the defendant has not pleaded his defence in writing under Order x., r. 18, the judge is not in any way precluded from considering the provisions of the Rent Restrictions Act having regard to r. 18 of the rules made under that Act. But then the question arises under what circumstances does r. 18 come into operation? Is it the duty of the county court judge in every case to search with minute care in order to see whether the Act of 1920 applies? If that were so, the defendant here could raise the point before us, even although he had not clearly raised it in the Court below. I do not think, however, that that is the meaning of the rule. In my view the clear effect of the rule, which ought to be more widely known, is that where it appears on the evidence before the judge that the case is one which falls within the provisions of the Rent Restrictions Act, 1920, then the judge must see for himself that judgment is not given for a plaintiff unless there is a fulfilment of the conditions required by the various sections of the Act. For example, he could not give a judgment contrary to the limitations imposed by s. 5 of the Act. That is the view which I take of the rule, and I have only to add that, having regard to what happened in the Court below, I am satisfied that the Rent

Restrictions Act was not raised before the learned judge, and I am also satisfied that there was no evidence at all before him which should have led him to hold that the premises were premises to which the Act applied. Therefore r. 18 had no application to the present case. For the reasons I have given I am of opinion that the judgment cannot be supported and that the plaintiff is entitled to possession. There will therefore be judgment for possession and for 39*l.* in respect of mesne profits.

SALTER J. I am of the same opinion, and on the first and second points I have nothing to add. The result would be that, subject to the third point with which I am about to deal, the plaintiff would be entitled to judgment. It is said that our proper course is to send the case back for a rehearing, and our attention has been called to r. 18 of the Statutory Rules and Orders under the Rent Restrictions Act. It is contended that the meaning of that rule is that whenever there is an action in the county court for the recovery of rent or interest on mortgage or for the recovery of the possession of premises or to eject a tenant from any premises, a twofold duty is cast on the Court, first, to inquire whether the premises for which rent is claimed or of which possession is claimed do or do not fall within the provisions of the Rent Restrictions Act, and secondly, if they do, whether the order asked for can be properly made. If that were the true meaning of r. 18, no doubt the proper decision would be to order a new trial. But in my opinion that is not the true meaning of the rule. If it were, I think the rule would run as follows: "Where proceedings are taken in the county court for the recovery of rent of any premises, or of interest on a mortgage or for the recovery of possession of any premises or for the ejectment of a tenant from any premises, the Court shall" and so on. Such a reading of the rule would deprive of all meaning the words "to which the Act applies," which occur in the second, third and fourth lines, and the word "such," which occurs in the fifth line. I think that the meaning of the rule is that where there is in the county court an action of the kind

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mentioned, and where it appears to the Court from the evidence that the premises are premises to which the Act applies, then the second of the two duties falls on the county court judge—namely, to decide whether the order asked for can properly be made. That duty is thrown on the judge, whether the Act is pleaded or not and whether the point is taken or not. The rule is for the protection of small tenants who may very likely conduct their cases without much skill. In the present case there was no evidence that the premises were within the Act, and consequently the plaintiff is entitled to his common law rights. The judgment must be set aside and judgment entered for the plaintiff for possession and mesne profits.

Appeal allowed.
Judgment for plaintiff.

Solicitors for plaintiff: *Gery & Brooks.*
Solicitor for defendant: *L. Silkin.*

F. C.

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July 3, 9, 10, 11, 13.

KEEVES *v.* DEAN.

NUNN *v.* PELLEGRINI.

Landlord and Tenant—Notice to quit—Tenant retaining Possession—Right of Tenant to assign Tenancy—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 8, *s.* 15, *sub-ss.* 1, 2.

A tenant of a dwelling house who has received notice to quit the demised premises, but who retains possession as a statutory tenant in accordance with the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, is entitled, subject to the provisions of s. 15, sub-s. 2, of the Act, to assign his interest in the premises to an assignee unless there are words in the contract of tenancy which preclude him from doing so.

KEEVES *v.* DEAN.

APPEAL from Croydon County Court.

In 1920 the plaintiff, who was the owner of No. 268 London Road, Thornton Heath, let the premises to Mr. Percy Beach as a weekly tenant. There was no written agreement of

tenancy. On August 19, 1922, the plaintiff gave Beach notice to quit the premises on or before August 28, but he continued in possession.

On January 5, 1923, the plaintiff received a letter from the defendant's solicitor stating that Beach had assigned the premises No. 268 London Road by indenture dated January 3, 1923, to the defendant, John Dean.

On January 10, 1923, the plaintiff's solicitors wrote to the defendant giving him notice to vacate the premises, and on January 11 the defendant's solicitor replied stating that the defendant declined to vacate the premises, "the assignment of the tenancy to him by Mr. Beach, his predecessor, being quite regular and in full conformity with that gentleman's legal rights." On January 18 the plaintiff's solicitors wrote to the defendant's solicitor stating that Mr. Beach was only a statutory tenant and could not therefore assign.

The plaintiff brought the present action to recover possession of the premises.

The county court judge made an order for possession.

The defendant appealed.

Oddy for the defendant. The county court judge was wrong in holding that the defendant was not a tenant. His predecessor in title, the statutory tenant, had an interest in the premises; that is property, and, consequently, he could assign it. In *Parkinson* v. *Noel* (1) Greer J. held that the statutory tenancy passed to the trustee in the bankruptcy of the statutory tenant, and in *Mellows* v. *Low* (2) a Divisional Court held that it passed to the administratrix of an intestate statutory tenant. By analogy, therefore, it passes to an assignee. By s. 12, sub-s. 1 (*f*), of the Increase of Rent, &c. (Restrictions), Act, 1920, "tenant" includes "any person from time to time deriving title under the original . . . . tenant."

Sect. 15, sub-s. 2, which forbids the taking by the statutory tenant of any consideration as a condition of giving up possession, implies that he may assign without consideration.

(1) [1923] 1 K. B. 117. (2) [1923] 1 K. B. 522.

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[*Brewer* v. *Jacobs* (1); *Collis* v. *Flower* (2); and *Reeves* v. *Davies* (3) were also referred to.]

Highmore King for the plaintiff. The rights of the statutory tenant are purely personal, and the cases in which they have been held to pass have been cases of vesting by operation of law. A statutory tenancy is of some value, and in *Parkinson* v. *Noel* (4) the tenancy passed under the extremely wide words defining "property" in s. 167 of the Bankruptcy Act, 1914. The fact that a statutory tenancy vests in the trustee in bankruptcy does not show that it can be validly assigned by the tenant to an assignee. The operation of the Rent Restrictions Act (5) ought not to be extended beyond the principle of the decided cases.

Oddy replied. *Cur. adv. vult.*

NUNN *v.* PELLEGRINI.

Appeal from Ipswich County Court.

The plaintiff, Walter Nunn, was the landlord of a dwelling house and shop at No. 1 Upper Barcley Street, Ipswich. In 1920 the premises were let to one Stebbings on a weekly tenancy at a rent of 9*s.* per week. In May, 1920, notice to quit was served upon Stebbings and the rent was increased within the limits of the Rent Restrictions Act, 1920. In the letting to Stebbings there was no prohibition against assignment, but in the later rent-books there was a prohibition against sub-letting. In December, 1922, the defendant bought from Stebbings the goodwill, fixtures and stock of the business which had been carried on at the premises.

(1) [1923] 1 K. B. 528, 531.
(2) [1921] 1 K. B. 409.
(3) [1921] 2 K. B. 486, 490.
(4) [1923] 1 K. B. 117.
(5) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (1.): "A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act. . . . . (2.) Any tenant retaining possession as aforesaid shall not as a condition of giving up possession ask or receive the payment of any sum, or the giving of any other consideration, by any person other than the landlord, and any person acting in contravention of this provision shall be liable on summary conviction to a fine. . . . ."

It was part of the bargain that Stebbings' interest in the tenancy should be transferred to the defendant. A document of transfer was drawn up and the sale was completed on January 18, 1923. Stebbings then erased his name from the outside of the rent-book and inserted the defendant's name, handing the book to the defendant. The defendant received the key of the premises and entered into possession. Rent had been tendered by the defendant to the plaintiff but refused. In March, 1923, the plaintiff brought an action for ejectment against the defendant claiming possession of the premises and damages or mesne profits. The defendant claimed to be in lawful occupation of the premises as tenant of the plaintiff, or in the alternative as sub-tenant of Stebbings, and also claimed the protection of the Rent Restrictions Act, 1920. The county court judge held that his statutory tenancy had never been brought to an end, and that the plaintiff was not entitled to possession.

He further held (*a*) that a weekly tenancy was assignable; (*b*) that a statutory tenancy was assignable: *Parkinson* v. *Noel* (1); and (*c*) that this was a case, where if a deed should be necessary, a Court of Equity would grant specific performance of the agreement to assign, and that since the Judicature Act the equitable assignee was in as good a position as if a deed had been executed: *Manchester Brewery Co.* v. *Coombs*. (2)

C. E. Jones for the plaintiff. A weekly tenancy is not assignable. Even if it is assignable, that does not apply to a statutory tenancy under the Rent Restrictions Act, 1920. Here Stebbings, who assigned to the defendant, had previously received notice to quit and so had become a statutory tenant. A statutory tenant has not the rights of a tenant in the ordinary sense of the term, but is only entitled to continue in occupation, and upon that alone his rights depend. This is clear from the judgments in *Remon* v. *City of London Real Property Co.* (3)

(1) [1923] 1 K. B. 117. (2) [1901] 2 Ch. 608, 617.
(3) [1921] 1 K. B. 49.

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[SANKEY J. The county court judge here held that the statutory tenant never gave up possession.]

Yes; but he committed a breach of the conditions of tenancy in assigning and was therefore not entitled to remain statutory tenant: *Brewer* v. *Jacobs*. (1) Physical occupation is essential to a statutory tenancy. It is true that sub-letting is recognized in s. 12, sub-s. 1 (*g*) of the Act of 1920, but that only refers to sub-letting before the statutory tenancy came into force. There is, however, here no question of sub-letting; it is either assignment or nothing.

Parkinson v. *Noel* (2) is distinguishable, for there the assignment to the trustee in bankruptcy was allowed in the interests of creditors; it was not a voluntary assignment by the tenant's own act. The statutory tenancy would not pass to the trustee under a voluntary deed of assignment for the benefit of creditors.

Finally, the assignment here, if permitted, ought to have been by deed—Real Property Act, 1845, s. 3; in the absence of a deed it is void at law.

W. R. Elliston for the defendant. A tenant for the purposes of the Act of 1920 includes "any person from time to time deriving title under the original tenant": s. 12, sub-s. 1 (*f*). That includes an assignee in the position of the defendant. There was no prohibition in the present tenancy against assigning. In *Mellows* v. *Low* (3) it was held that the administratrix was a person deriving title from a deceased tenant, and in *Collis* v. *Flower* (4) the same decision was arrived at as to the executor of a deceased tenant. It is clear from *Parkinson* v. *Noel* (2) that a statutory tenancy is not a mere personal right but is "property" of some value and therefore capable of being assigned by the tenant just as an ordinary tenancy at common law, if the Act of 1920 permits. The right to assign is recognized in s. 15, sub-s. 1, of the Act of 1920, by which the statutory tenant is given "the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions

(1) [1923] 1 K. B. 528.
(2) [1923] 1 K. B. 117.
(3) [1923] 1 K. B. 522.
(4) [1921] 1 K. B. 409.

of this Act"; and by sub-s. 2 the statutory tenant is not as a condition of giving up possession to ask or receive any consideration from "any person other than the landlord." That shows that an assignment is allowed, if no payment is received from the assignee as consideration for the assignment. Even if payment is received the assignment is not necessarily invalid, but the payment can be recovered by the assignee and the assignor is liable to a fine under that section. As to the third point, the assignment is valid although no deed was executed. For the circumstances are such that a Court of Equity would grant specific performance of the contract, and if so the transaction is valid: *Walsh* v. *Lonsdale* (1) and *Manchester Brewery Co.* v. *Coombs.* (2)

Cur. adv. vult.

July 13. SANKEY J. These two cases raise the same question—namely, whether a tenant who by virtue of the Rent Restrictions Act, 1920, has remained in possession of a dwelling house and who may for the sake of convenience be described as a statutory tenant, is entitled to assign his statutory tenancy. [His Lordship stated the facts in the two cases and continued:] A number of cases have been cited to us in the course of argument, but there is no direct authority bearing upon the point; and indeed only one of these decisions appears to touch the present cases at all. Situations may arise in which a person entitled to a statutory tenancy is nevertheless unable to remain tenant owing to some disability. Counsel for the landlord in *Nunn's Case* argued that the Rent Restrictions Act, 1920, does not recognize sub-tenancies which have been created after the commencement of the statutory tenancy. The question of sub-tenancies is dealt with in s. 8, s. 12, sub-s. 1 (*g*), and s. 15, sub-s. 3, of the Act of 1920, and having regard to these sections and particularly to the word "grant" which is used in s. 8, I am not at present convinced that the Act does not allow the creation of sub-tenancies by the statutory tenant. In *Mellows* v. *Low* (3) it was held that an administratrix is a

(1) (1882) 21 Ch. D. 9. (2) [1901] 2 Ch. 608. (3) [1923] 1 K. B. 522.

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person who derives title under the original tenant within s. 12, sub-s. 1 (*f*), of the Act. That has no bearing upon the present cases, it merely distinguishes the effect of sub-s. 1 (*f*) from that of sub-s. 1 (*g*). In *Collis* v. *Flower* (1) it was held that an executor is "tenant" of a house within the meaning of the Act and is entitled to its protection. That again has nothing to do with the facts in the present cases. In *Parkinson* v. *Noel* (2) it was held, as stated in the headnote, that a statutory tenancy under the Rent Restrictions Act, 1920, is "property" of the tenant within the meaning of the Bankruptcy Act, 1914, s. 167. That case is not on all fours with the present: for by s. 15, sub-s. 2, "any tenant retaining possession as aforesaid shall not as a condition of giving up possession ask or receive the payment of any sum, or the giving of any other consideration, by any person other than the landlord" and any person acting in contravention of that provision is liable to a penalty. It is quite open to a tenant under that section to make a bargain with his landlord as to the premises, and any such right will pass to the trustee upon the bankruptcy of the tenant, having regard to the wide definition of "property" contained in the Bankruptcy Act, 1914. The decision in *Parkinson* v. *Noel* (2) does show however that the right of a statutory tenant is not a mere personal right to remain in occupation; and that there may be other rights which are valuable to the tenant, such as the right to a sum of money in consideration of a surrender of the tenancy.

Now it is from the Rent Restrictions Act itself that one must gather whether the right to assign is or is not conferred on the statutory tenant. The tenant has, as has been seen, more than a mere personal right, and the decisions in *Mellows* v. *Low* (3) and *Collis* v. *Flower* (1) show that the administratrix and also the executor of the original tenant are entitled to the protection of the Rent Restrictions Acts. The right to assign, if it exists at all under the Act of 1920, appears to spring from s. 15, sub-s. 1, which provides that "a tenant

(1) [1921] 1 K. B. 409. (2) [1923] 1 K. B. 117.
(3) [1923] 1 K. B. 522.

who by virtue of the provisions of this Act retains possession of any dwelling house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act." Those are, in my view, the material words, and I read them as meaning that the tenant must observe and is also entitled to the benefit of all the terms and conditions of the original contract of tenancy, express or implied.

There may be in the original contract a condition against assignment or a condition that assignment shall only be permitted with the consent of the landlord, and the tenant would have to observe any such condition. But in the absence of any such terms or conditions in the original contract of tenancy there is an implied term or condition that the tenant shall have the right to assign. If the tenant must observe a condition forbidding him to assign, he is equally entitled to the benefit of the implied condition that he shall be entitled to assign, unless it is expressly excluded in the contract. In neither of these cases is there a term or condition forbidding the tenant to assign, and he is therefore entitled to the benefit of an implied term enabling him to assign, provided such a term is consistent with the provisions of the Act of 1920. Can it then be deduced from that Act that a term enabling the tenant to assign is inconsistent with its provisions? There is no such prohibition or inconsistency shown in the Act, and having regard to the decisions already mentioned to the effect that the right of the statutory tenant is not a mere personal right of occupation I think that the statutory tenant does possess the right to assign. That concludes the case so far as *Keeves* v. *Dean* is concerned and in that case the appeal must be allowed.

As to the second point, which arose only in *Nunn's Case*, the county court judge held that although the assignment by the statutory tenant was not executed under seal, yet that upon the facts proved a Court of Equity would grant specific performance of the contract to assign and would direct a

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formal deed of assignment to be executed. In my opinion he was right in so holding.

Counsel for the landlord further argued that s. 15, sub-s. 2, renders it illegal for a statutory tenant to assign or to give up possession to any person other than the landlord and to take any consideration for so doing. He contended that possession was given to Pellegrini by the statutory tenant in return for a money payment, and that the assignment is therefore illegal and that a decree for specific performance would not be granted. I express no opinion as to that proposition; for it may be that upon the cases, even if a money payment were taken, the assignment itself would be valid although the penalties prescribed by the section were incurred. But there is no evidence here nor any finding by the county court judge to the effect that there was any payment by the assignee to the assignor which would lead us to conclude that the assignment was illegal.

The judgment in *Nunn* v. *Pellegrini* was therefore right, and the appeal fails.

SALTER J. I agree. The question of the right of a statutory tenant to assign has not hitherto been decided. The cases of *Collis* v. *Flower* (1) and *Mellows* v. *Low* (2) have no bearing on the point, because in neither of those cases was there any assignment or transfer by the statutory tenant. There is no doubt that at common law a tenant has a right to assign his interest unless he is precluded from doing so by his contract with the landlord. The effect of the Rent Restrictions Acts has been to add a new value to the tenant's right in this respect. It cannot be assumed that because Parliament has increased the value of the tenant's interest, it intended to take away the right of the tenant to assign such interest. It has been decided that a statutory tenant's interest is property which is divisible amongst the tenant's creditors in bankruptcy. Prima facie a person has a right to transfer his property to others if he pleases, and a statutory tenant may assign his interest unless the Act contains

(1) [1921] 1 K. B. 409. (2) [1923] 1 K. B. 522.

some indication to the contrary. But the Act contains provisions which show that the statutory tenant is entitled to assign. My Lord has read s. 15, sub-s. 1, and has pointed out that "the terms and conditions of the original contract of tenancy" there referred to must include not only those which are express, but also those which are implied. The statutory tenant may therefore assign his interest if he was entitled to do so under the original contract of tenancy and if he is still in possession, unless such a right is inconsistent with the provisions of the Act. The question then arises whether the Act shows an intention that the statutory tenant should have the mere personal privilege of resisting ejectment from the premises or whether he should have an estate like that of a common law tenant. Looking at the Act as a whole and particularly at s. 12, sub-s. 1 (*f*) and (*g*), and s. 15, sub-ss. 1 and 2, I conclude that the Act confers on the statutory tenant an estate which can pass to others either by operation of law or by the tenant's own act. There was no evidence in the present cases to show that any premium was paid to the tenants as consideration for the assignments, and it is therefore unnecessary to consider whether the taking of a premium would have been an offence under s. 15, and if so, whether there would have been any ground for holding that the assignments were on that account invalid.

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Appeal allowed.

Solicitors for appellant: *Gibson & Weldon, for F. Gowen, Croydon.*

Solicitors for respondent: *Peard & Son.*

NUNN *v.* PELLEGRINI.

Appeal dismissed.

Solicitor for plaintiff: *Bernard Pretty, Ipswich.*

Solicitors for defendant: *Foyer, White, Borrett & Black, for Westhorp, Cobbold & Ward, Ipswich.*

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COMMISSIONERS OF INLAND REVENUE *v.* MARION BROOKE.

ELLEN MURRAY (Formerly Ellen Harwood) *v.* COMMISSIONERS OF INLAND REVENUE.

COMMISSIONERS OF INLAND REVENUE *v.* CAPTAIN LOCKHART LEITH, R.N.

COMMISSIONERS OF INLAND REVENUE *v.* A. C. Y. BELL.

COMMISSIONERS OF INLAND REVENUE *v.* THE RT. HON. FRANCES, VISCOUNTESS PORTMAN.

Revenue—Super Tax—Income of Wife—Liability for in Year of Assessment—Marriage in previous Year—Liability of Wife—Liability of Husband—Marriage in Year of Assessment—Liability of Wife—Death of Husband in previous Year—Liability of Widow—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 5, *sub-s.* 1; *s.* 7, *sub-s.* 6; *First Schedule, General Rules, rr.* 16, 17 —*Finance Act*, 1919 (9 & 10 *Geo.* 5, *c.* 32), *s.* 26.

Under the provisions of the Income Tax Act, 1918, relating to super tax, by one of which for the purposes of that tax the total income of any individual for the year of assessment shall be taken to be the total income of that individual for the previous year:—

Held, that for the purposes aforesaid (1.) the total income of a woman married in the previous year and living with her husband during the remainder of that year and the year of assessment includes her income during the part of the previous year which preceded her marriage; (2.) the total income of a woman married in the year of assessment, and formerly since the commencement of the previous year unmarried, includes her income during the previous year; (3.) the total income of a man married in the previous year, whose wife has lived with him during the remainder of that year and the year of assessment, includes his wife's income for the part of the previous year subsequent to, but not for the part prior to, the marriage; (4.) the total income of a woman whose husband has died during the previous year and who during the remainder of that year and the year of assessment has been unmarried, includes her income for the part of the previous year subsequent to, but not for the part prior to her husband's death.

Five cases stated by the Commissioners for the Special Purposes of the Income Tax Acts.

COMMISSIONERS OF INLAND REVENUE *v.* MARION BROOKE.

Marion Brooke, the respondent, was from April 6, 1913, to March 12, 1914, a feme sole. On the latter date she married Mr. Brooke, and during the year ended April 5, 1915, she was living with her husband. The amount of the respondent's income for the period from April 6, 1913, to March 11, 1914, liable to British income tax exceeded 3000*l.*, the limit of income above which super tax was chargeable for the year ended April 5, 1915. No application for separate assessment was made under s. 9 of the Finance Act, 1914, or could have been made for that year within the prescribed time. In March, 1918, respondent was assessed to super tax for the year ending April 5, 1915. The respondent appealed against the assessment to the Special Commissioners.

On behalf of the respondent it was contended that by virtue of s. 45 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), which was made applicable to super tax by s. 72, sub-s. 6, of the Finance (1909–10) Act, 1910, it was not competent to charge the respondent to super tax for the year ended April 5, 1915, during which she was a married woman living with her husband.

On behalf of the Crown it was contended that the assessment was rightly made on the respondent.

The Special Commissioners upheld the contentions on behalf of the respondent and discharged the assessment.

ELLEN MURRAY (FORMERLY ELLEN HARWOOD) *v.* COMMISSIONERS OF INLAND REVENUE.

Ellen Murray, formerly Ellen Harwood, the appellant, was a married woman living with her husband, whom she married on August 16, 1921. Before that date she was a widow, her former husband Mr. Harwood having died in 1912. Under the will of Mr. Harwood the appellant became entitled (inter alia) to certain interests during her life, but ceasing on her remarriage. Her income from this source during the year ended April 5, 1921, amounted to a sum of over 16,000*l.*

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On October 17, 1921, the appellant made for the purposes of super tax for the year ending April 5, 1922, a return in a sum of over 19,000*l.*, being her total income from all sources for the whole of the year ended April 5, 1921, that sum being made up of the said sum of over 16,000*l.*, together with income from other sources amounting to a sum of over 2000*l.* No claim for separate assessment to super tax was made by either the appellant or her husband. On January 2, 1922, an assessment to super tax for the year ending April 5, 1922, was duly made on the appellant in the name of Mrs. Ellen Murray in the said sum of over 19,000*l.* The appellant appealed against the assessment to the Special Commissioners.

On behalf of the appellant it was contended that the assessment was wrongly made upon her, as she was at the time a married woman living with her husband, and alternatively, that the assessment should be apportioned up to the date of her remarriage on August 16, 1921; that the Income Tax Act, 1918, All Schedules Rules, r. 16, was applicable to super tax by s. 7, sub-s. 6, of that Act; and that the assessment of the appellant should be set aside or reduced.

On behalf of the Commissioners of Inland Revenue it was contended that the assessment was rightly made.

The Special Commissioners confirmed the assessment.

COMMISSIONERS OF INLAND REVENUE *v.* CAPTAIN LOCKHART LEITH, R.N.

In the course of the year ending April 5, 1920—namely, on July 1, 1919—Captain Lockhart Leith, R.N., the respondent, was married. An assessment to super tax was made upon the respondent for the year ending April 5, 1921, in the sum of 3999*l.*, which included the whole of Mrs. Lockhart Leith's income for the year ending April 5, 1920. The respondent appealed against the assessment to the Special Commissioners.

It was contended on behalf of the respondent that under the Income Tax Act, 1918, All Schedules Rules, r. 16, in computing the total income of the respondent for the purpose

of the assessment only the portion of his wife's income for the period between July 1, 1919, and April 5, 1920, during which she was a married woman, should be included. Mrs. Lockhart Leith was at all times willing to pay super tax separately on her income for the period from April 6, 1919, to June 30, 1919.

It was contended on behalf of the Commissioners of Inland Revenue that as the respondent was married during the whole of the year of assessment the whole of his wife's income for the year ending April 5, 1920, should be included in the computation of the respondent's total income.

The Special Commissioners accepted the respondent's contention, and they accordingly discharged the assessment, the figures showing that on this basis there was no liability to super tax.

COMMISSIONERS OF INLAND REVENUE *v.* A. C. Y. BELL.

In the course of the year ending on April 5, 1920,—namely, on October 16, 1919—Mr. A. C. Y. Bell, the respondent, was married. An assessment to super tax was made upon him for the year ending April 5, 1921, in a sum which included the whole of his wife's income for the previous year ending April 5, 1920. Against this assessment the respondent appealed to the Special Commissioners, who held, as in the previous case, that in the said assessment of the respondent the income of his wife to be included was her income from October 16, 1919, the date of the marriage, to April 5, 1920, and not the whole of her income for the year ending April 5, 1920.

COMMISSIONERS OF INLAND REVENUE *v.* THE RT. HON. FRANCES, VISCOUNTESS PORTMAN.

The second Viscount Portman, the late husband of Frances, Viscountess Portman, died on October 16, 1919, having made a return and been assessed to super tax for the year ended April 5, 1920, by reference to the whole of his own and his wife's income for the previous year. An

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assessment to super tax was made upon his widow, the said viscountess, the respondent, for the year ending April 5, 1921, by reference to her income for the whole of the year ended April 5, 1920. The respondent appealed to the Special Commissioners against the assessment. It was contended on behalf of the respondent that she should be assessed to super tax for the year in question only in respect of her income from October 16, 1919, to April 5, 1920, being the part of the year ending on the latter date during which her husband was alive—namely, in the sum of 3176*l*. It was contended on behalf of the Commissioners of Inland Revenue that she should be assessed in the full amount of her income for the whole year ending April 5, 1920. The Special Commissioners held that the contention on behalf of the respondent was correct and amended the assessment accordingly.

R. P. Hills (*Sir Douglas Hogg A.-G.* with him) for the Commissioners of Inland Revenue.

The cases in question relate to the liability for super tax in respect of the income of a lady whose marriage has taken place either in the year previous to the year of assessment, or in the year of assessment, or who has become a widow in the previous year. The principles applicable to these cases are to be found in the provisions of the Income Tax Act, 1918, relating to super tax, which incorporate and supersede the corresponding provisions of the earlier Acts. Sect. 4 provides that in addition to income tax there shall be charged a further duty referred to as super tax. Sect. 5, sub-s. 1, provides that "For the purposes of super tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year," subject to the provisions thereinafter contained. That provision supersedes the Finance (1909–10) Act, 1910, s. 66, sub-s. 2. Under that provision super tax is an additional income tax, but for the purposes of super tax the income is to be taken to be the income for the previous year; and the income for the previous year is treated not merely as the measure of the amount of the income for the

year of assessment, but as the actual income for the latter year: see *Brown* v. *National Provident Institution*. (1) It is clear that under that provision and in the absence of any other enactment a woman whether unmarried or married would in any year be assessable in the amount of her income for the year before. The Act of 1918, First Schedule, All Schedules Rules, r. 16, however, provides as to income that: "A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried: Provided that—(1.) the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee; . . . ." these provisions replacing the similar provisions of the Income Tax Act, 1842, s. 45. The Act of 1918, s. 7, sub-s. 6, which supersedes the Finance (1909–10) Act, 1910, s. 72, sub-s. 6, provides that all provisions of the Act relating to persons to be chargeable with income tax, and to the assessment, collection, and recovery of income tax shall so far as applicable apply to the charge, assessment, collection, and recovery of super tax; and that sub-section therefore makes r. 16 applicable to super tax.

Under these provisions, where a woman has been married and living with her husband during the whole of the year of assessment and of the previous year, her income would be deemed to be part of his for the purpose of super tax. In each of the cases in question, however, the lady has been married during a part only of the previous year or of the year of assessment. On the true construction of the provisions referred to, where the lady's marriage has taken place in the previous year, she is liable to be assessed to super tax in respect of her income for the whole of that year, notwithstanding that she was married throughout the year of assessment. Where her marriage has taken place in the year of assessment, all the more should she be liable to assessment in respect of the whole of her income for the previous

(1) [1921] 2 A. C. 222.

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year, throughout which she was unmarried. Where the lady's marriage has taken place in the previous year, she is at least assessable in respect of her income for the part of that year during which she was unmarried.

On the same principles, where the lady's husband has died in the previous year she is assessable to super tax in respect of her income for that year, or at least for the part of that year during which she was a widow. Under s. 6 of the Act of 1918, which supersedes s. 6 of the Finance Act. 1912 (2 & 3 Geo. 5, c. 8), her deceased husband's estate would not be liable for more than a part of that year's tax proportionate to the part of that year which had elapsed before his death. That a married woman living with her husband could be assessed to super tax in respect of her income notwithstanding the fact of her marriage appears from the Revenue Act, 1911 (1 Geo. 5, c. 2), s. 11 (repealed). Where an individual has had an income of taxable amount in the year previous to the year of assessment, that individual is liable to assessment, notwithstanding that owing to a change in circumstances he or she is not, or is not to be deemed to be, in receipt of the income in the year of assessment: *Brooke* v. *Inland Revenue Commissioners* (1); *Fitzgerald* v. *Inland Revenue Commissioners* (2); and *Crane* v. *Inland Revenue Commissioners.* (3) Super tax is a retrospective tax on the income of the person charged for the previous year, and, provided that person is alive in the year of assessment, it is immaterial whether or not the income continues during that year: *Fitzgerald* v. *Inland Revenue Commissioners.* (2) Although a lady who has been married during the year previous to the year of assessment is liable to be assessed in respect of her income for that previous year, or at all events for the part of that year during which she was unmarried, it does not follow that her husband, where she is living with him, is not liable in the alternative to assessment in respect of her income for that year. If it cannot consistently be said that her husband is liable to assessment in respect of her income

(1) [1917] 1 K. B. 61; affirmed on other points [1918] 1 K. B. 257.
(2) [1919] 2 K. B. 154.
(3) [1919] 2 K. B. 616.

for the whole of the previous year, he is at least liable in respect of the part of that year during which he was unmarried. There is reason for believing, however, that in cases such as these the amount of the tax for the broken year cannot be divided for this purpose as between the husband and wife except where an application has been made for separate assessment. The Act of 1918, s. 8, which superseded the Finance Act, 1914, s. 9, provides that on the making of such an application before a certain date the income of husband and wife shall be treated as one for this purpose, and the amount of super tax shall be apportioned between them. The Finance Act, 1919, s. 26, substituted another date and provided that "an application for the purposes of those provisions may in the case of persons marrying during the course of a year of assessment be made as regards that year" at any time before the substituted date. That section implies that even where a marriage takes place in the year of assessment there will be an assessment to include the incomes of both husband and wife respectively for the previous year during the whole of which they were unmarried, as otherwise there would be no occasion for separate assessment. If that be so where the marriage takes place in the year of assessment, a fortiori where the marriage has taken place in the previous year must there be an assessment in the full amount of both incomes. In this connection it may also be observed that the Revenue Act, 1911, s. 11 (repealed), clearly implied that, where the wife had not been required to make a return under that section, her income and her husband's should be treated as one income for the purposes of super tax. It follows that in none of the cases in question can the super tax on the wife's income for the year be apportioned as between the husband and wife. According to that view and on the true construction of all the above provisions, in each of these cases the wife's income for the whole of the previous year should be treated as her own income, and she should be assessed in respect of that income.

It is submitted that: in Mrs. Brooke's case the respondent

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is assessable to super tax in respect of her income for the whole of the year previous to the year of assessment, or at least for the part of that year during which she was unmarried, and that the appeal should be allowed; in Mrs. Murray's case the appellant is assessable to tax in respect of her income for the whole of the previous year during the whole of which she was unmarried, notwithstanding that she was married in the year of assessment; in Captain Lockhart Leith's case the respondent is assessable in respect of his wife's income for the whole of the previous year, or at least for the part of it during which they were married; in Mr. Bell's case the respondent is in the same position as the respondent in the previous case; and in Lady Portman's case the respondent is assessable in respect of her income for the whole of the previous year, or at least for the part of it during which she was a widow, notwithstanding that her husband was alive for part of it.

Latter K.C. (*J. H. Bowe* with him) for the respondent in Brooke's case, and (*C. L. King* with him) for the appellant in Murray's case and the respondent in Lockhart Leith's case.

In the provisions of the Income Tax Act, 1918, relating to super tax, which supersede those of the earlier Acts, principles are to be found by which all the cases before the Court can be consistently determined. It is clear from ss. 4 and 5 of the Act that in order that super tax may be levied it is necessary that there should be an individual chargeable in the year of assessment, and that he should have had in the previous year an income of the amount liable to super tax. In order to find the individual chargeable, if any, in the case of married persons it is necessary to consider the statutory provisions. Under the Act of 1918, First Schedule, All Schedules Rules, r. 16, as under the former Act of 1842, s. 45, a married woman entitled to profits for her separate use shall be assessable to income tax as if unmarried, provided that her profits where she is living with her husband are to be deemed his profits and the husband and not the wife is to be assessed in respect of them;

and the Act of 1918, s. 7, sub-s. 6, superseding the Finance (1909–10) Act, 1910, s. 72, sub-s. 6, applies these provisions to super tax so far as they are applicable. Under these provisions where a married woman having an income liable to super tax has been living with her husband during the year of assessment and the previous year, it is clear that she is not liable to tax in respect of her income: see *In re Ward*. (1) The cases in question, however, are not cases in which the husband and wife have been married and living together during the whole of the year of assessment and the previous year, but cases in which the marriage has taken place or the husband has died during one or other of these years. Where the marriage has taken place in the year of assessment and the husband and wife are living together, neither of them is assessable to super tax in respect of the wife's income for the previous year. As to the wife, she ceases to be assessable on her marriage by virtue of the provisions referred to. As to the husband, there is no statutory provision making him liable to assessment in respect of his wife's income for the previous year during which she was not his wife, and it would be inequitable to hold him liable in respect of that income. Where the marriage has taken place in the previous year and the parties are living together, neither of them is assessable in respect of the wife's income for that year, or at all events in respect of the whole of her income for that year. The wife is exempt from liability by virtue of the provision referred to, or at most she is only liable in respect of the part of the year during which she was unmarried. As to the husband there is no express provision making him liable in such a case. The provision which renders a husband liable in respect of his wife's income is primarily an income tax provision, the provisions relating to income tax are only applied to super tax "so far as they are applicable," the provisions relating to income tax have application only to the year of assessment and not to the previous year, and therefore the provision as to the husband's liability is not applied to super tax which is a tax on the income of the previous year. In

(1) [1922] 1 Ch. 517.

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any case the husband is only liable in respect of the part of the previous year during which he was married: *Brooke* v. *Inland Revenue Commissioners*. (1) Sect. 26 of the Finance Act, 1919, which provides that an application for separate assessment may in the case of persons marrying during the year of assessment be made as regards that year before a certain date, should not be construed as implying that in the case of super tax there will otherwise be an assessment on the husband to include his wife's income, which in that case must be her income of the previous year. That section is properly applicable only to income tax, and it was by mere inadvertence that the draftsman made it appear to apply to super tax also. In any case, the section is only permissive and not imperative and no great stress can be laid upon it.

To apply these principles to the cases here in question: in Mrs. Brooke's case the respondent is not liable to super tax in respect of her income for any part of the previous year, or at least not for that part of it during which she was married; in Mrs. Murray's case the appellant, having acquired the status of a married woman in the year of assessment, is not liable to tax in respect of her income for the previous year; in Captain Lockhart Leith's case, and likewise in the case of Mr. Bell, the respondent is not liable in respect of his wife's income for any part of the previous year, or at least not for that part of it during which he was unmarried.

R. R. Hills replied.

ROWLATT J. In these five cases the decisions of the Commissioners for the Special Purposes of the Income Tax Acts are not consistent with one another, and the learned counsel who argued the cases for the Crown therefore found himself technically obliged to advance in one case arguments contrary to those which he advanced in another. I am much obliged to him, however, for his assistance in dealing with this difficult subject, and I know that he recognizes that I must endeavour to reach a decision which will govern all the cases,

(1) [1917] 1 K. B. 61; [1918] 1 K. B. 257.

although it must involve the rejection of his argument in at least one of them.

Broadly speaking, the question which has arisen is as to super tax chargeable in respect of the income of a married woman who has been married within the relevant period—namely, either during the year of assessment, or during the basis year—the year of charge as I will call it. In none of the cases has there been any application by either husband or wife for a separate assessment, but, even if there had, I do not think that, except in respect of some small and outlying considerations, it would have made any difference. There are three possible alternative positions. The first is that the husband can be assessed in respect of the wife's pre-nuptial income, or in one case her post-nuptial income, within the relevant period. The second is that the wife can be assessed in respect of her pre-nuptial, or post-nuptial, income within the period. The third is that neither the husband nor the wife can be assessed in respect of that income, and that the tax upon it is lost to the revenue.

As regards the first question, whether the husband can be assessed in respect of his wife's income before marriage and within the relevant time, the answer turns upon the combined effect of the provision which is now s. 5, sub-s. 1, of the Income Tax Act, 1918, and the provision which is now r. 16 of the All Schedules Rules in the First Schedule to that Act and which was formerly s. 45 of the Income Tax Act, 1842. These provisions are so familiar that it is hardly necessary to read them. Sect. 5, sub-s. 1, provides as follows: "For the purposes of super tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year." If in construing the provisions the idea of the unity of husband and wife for income tax purposes be applied with reference to the period relevant for charge, the husband becomes liable in respect of all his wife's pre-nuptial income within the period. According to that view the words "the total income of any individual" are read as including in the case of married persons the aggregate income of the two simpliciter during

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the period of charge. That, I think, is the only way in which that result can be arrived at. On the other hand the argument that the husband is not liable in respect of his wife's pre-nuptial income within the period depends upon a reading of the words "the total income of any individual," which treats the husband as the individual only while he actually is the husband. According to that construction the total income of the husband from all sources for the previous year does not include the part of the lady's income for the time during which he was not her husband, though during that time he might of course have been the husband of another lady. It seems to me that the idea that the provision means that the husband can be assessed for his wife's pre-nuptial income is intolerable. The results of that construction would, I think, be grotesque beyond measure. It is not only possible, but it is the fact in one of these very cases that the lady was a widow whose income ceased on her remarriage. To say that in that case the husband was to be taxed on the income which his wife had before she married him would, I think, pass the bounds of reason. It does not stop there, because if she claimed a separate assessment she would be taxed on a higher scale by virtue of the income which her husband had before she married him. Nor does it stop even there, because, as I pointed out just now, he might have been the husband of another lady during part of the same year, and he would then be paying super tax on the incomes of two wives not successively but concurrently, and if the second wife desired to be separately assessed she would pay a higher rate of super tax, or, at any rate, her income would bear it whether or not she was separately assessed, not only on the income which her husband had before he married her, but also because of the income of his previous wife to whom he was married while she was still, so far as he was concerned, a feme sole. I have thought, I believe, of almost all the states of facts which could occur, although I do not go through them all. I think I have have said enough to show that it would be perfectly grotesque to say that under the provisions of

the Act the total income of a husband includes his wife's pre-nuptial income. One could not reach that conclusion unless one were driven to it, and I certainly do not think that the wording of the provisions drives me to it. Rule 16, proviso (1.), certainly says: "The profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee." That provision, however, refers to the profits of a married woman while she is a married woman and not to the profits which she had before her marriage, although at the time the question arises she is married. This is in consonance with the provisions of the Acts relating to super tax, which look back to the year before the year of assessment and tax retrospectively on the income for that year.

So far the weight of argument seems to be all on one side. Counsel for the Crown has, however, drawn my attention to s. 26 of the Finance Act, 1919, which certainly creates a difficulty, and has caused me to go into the matter as fully as I have. That section extends from May 6 to July 6 the time for applying for separate assessments of husband and wife under the Act of 1918, s. 8, which relates to super tax, and under the All Schedules Rules, r. 17, which relates to income tax, and so far no question arises upon it. It proceeds, however, as follows: "and an application for the purposes of those provisions may in the case of persons marrying during the course of a year of assessment be made as regards that year" at such and such a time. The latter part of that section clearly contemplates that persons marrying within the year of assessment have a certain time to make the application for separate assessment, which in the case of super tax must be with reference to their incomes for the previous year when they were not married, and it thus contemplates that they would otherwise be assessed together in respect of the incomes for that year. Can that section be treated as declaratory of the law when it must apparently be construed in a sense which is inconsistent with that of the other provisions of the

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Acts, and which is obviously contrary to reason? I do not think it can be so treated. The sub-section does not of course declare in express terms that the parties are to be assessed together to super tax in respect of the previous year's income, and the effect of my disregarding its bearing upon the assessment merely means that I recognize one aspect of it only and make another suggested aspect of it otiose—in fact that I construe it in such a way as to give no effect to the one letter which turns the word "provision" into "provisions." It would, I think, be more reasonable to construe the section in that way than to treat it as introducing the extraordinary result suggested.

The next question is whether the wife can be assessed in respect of her pre-nuptial income. It is clear that no difficulty arises because of her status at the moment of the making of the assessment. That position existed in the case of *Brooke* v. *Inland Revenue Commissioners* (1), which was before Atkin J. and afterwards before the Court of Appeal, where Mrs. Brooke was assessed when she was a married woman. In that case, however, the actual assessment was made after the year of assessment, and the case did not decide the question whether it was an objection that the woman was married in the year of assessment. For my part, I see no difficulty in the making of an assessment upon a married woman. Under r. 16 of the General Rules, formerly s. 45 of the Act of 1842, it is contemplated that she shall be assessed. It provides: "A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried," and then follow the provisos, the first of which I have already read. By virtue of that provision, even under the Act of 1842, a married woman, who was not living with her husband, could be assessed as such in respect of property to which she was separately entitled in equity, or which by custom belonged to her as a sole trader. The scheme of the Act does not exclude a married woman

(1) [1917] 1 K. B. 61; [1918] 1 K. B. 257.

from assessment merely because she is married. Does it exclude her when she is living with her husband? I do not think it necessarily does, because in my view the proviso only applies to profits of a married woman living with her husband which are made while she is a married woman. I do not think the enactment contemplated any other profits. When it first came into force it related only to income tax which was levied in respect of the year of assessment. When super tax was introduced and made chargeable with respect to the year before, the machinery had of course to be adapted to it. In my view, however, the provision in question has no application to income which accrues to a woman when she is sole merely because at the time when the assessment is made she is married. It therefore seems to me that a married woman can be assessed retrospectively on the income which accrued to her when she was single, notwithstanding that she is married at the time of assessment.

Having arrived at the principles which I think must be adopted, I proceed to deal with the specific cases before me. If these principles are right, I do not think much difficulty will be found in applying them in the various cases of married persons.

In the case of Mrs. Brooke, the respondent appealed against an assessment to super tax for the year ending April 5, 1915. On March 12, 1914, she married Mr. Brooke, and during the year of assessment she was living with him as his wife. The question is whether, seeing that she was during the year of assessment a married woman, she was liable to be assessed in respect of her income from April 6, 1913, to March 12, 1914, the date of her marriage—that is, for all the year of charge except the last fortnight. In the circumstances I think that Mrs. Brooke is liable to be assessed in respect of the income which she received during the year of charge until the date of her marriage. The decision of the Commissioners discharging her assessment must therefore be reversed.

In the case of Mr. Bell, the respondent was assessed to super

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tax for the year ending April 5, 1921. He was married on October 16, 1919, that is, in the middle of the year of charge. He was assessed in the aggregate of his own and his wife's income in the previous year. The question is whether he ought to be assessed in respect of the whole of his wife's income for that year, or only in respect of the part received after she married him. It follows from the decision which I have just given that he is to be assessed only in respect of the part of the year after he married. The Commissioners have so decided, and I therefore confirm their decision.

In the case of Mrs. Murray the appellant was assessed to super tax for the year ending April 5, 1922, in a sum of over 19,000*l.* She was living with her husband, whom she married on August 16, 1921, in the middle of the year of assessment. Down to that date she had been a widow since 1912. Under the will of her former husband she was entitled to a life interest, which ceased on her remarriage, and from which the income was upwards of 16,000*l.* On October 17, 1921, that is after her marriage but during the year of assessment, she made a return of the whole of her income for the previous year in the above sum of over 19,000*l.*, made up of the said sum of over 16,000*l.* and another sum of over 2000*l.*, which she kept notwithstanding her re-marriage. There has been no claim to a separate assessment. The assessment made upon the appellant was confirmed, and in my judgment rightly. I do not think it matters whether she was assessed before her marriage or after it, or that her marriage took place in the year of assessment. The Commissioners in giving their careful written decision say that this is no case for apportionment on marriage. That is perfectly true. The case does not enter the region of apportionment, because the appellant was just as much assessable after her marriage as before it in respect of her income of the previous year when she was a feme sole. I confirm the decision of the Commissioners in that case.

The next case is that of Captain Lockhart Leith. Here the respondent was assessed for the year ending April 5, 1921. He was married in July, 1919, that is to say in the middle of the

year of charge. The question is whether in computing the respondent's total income for the year ending April 5, 1921, for the purpose of super tax, the amount of his wife's income to be included is the amount of that income for the whole of the year ending April 5, 1920, or only the amount from July 1, 1919, the date of the marriage, to April 5, 1920. My decision is that the amount of his wife's income to be included is the amount from the date of the marriage in the year of charge to the end of that year. The case is the same as that of Mr. Bell.

The last case is that of Viscountess Portman. There the assessment of the respondent is for the year 1920–21. She lost her husband on October 16, 1919, in the middle of the year of charge. The question is whether she should be assessed to super tax for the year in question by reference to the amount of her income for the whole of the previous year, including the part of the year during which her husband was alive—namely, 4000*l.*—or by reference only to the amount for the part of that year during which she was a widow. It seems to me clear that she could only be assessed in respect of the time during which she was a widow. The income which accrued to her while her husband was living was income for which he was under an inchoate liability to super tax, that is to say, it was income for which if he had lived to the end of the year he would have been liable to a year's super tax in the next year, or for which, if the liability to tax does not die with the subject, his executors would have been liable in the next year. As matters stand, the Revenue loses the super tax on his total income including the income of his wife for that part of the year 1919–20 which elapsed after his death. In this case I confirm the decision of the Commissioners.

As regards costs, counsel for the Crown has said very frankly that in these cases a difficulty had arisen owing partly to the inconsistent decisions of the Commissioners, and that he left the matter of costs entirely in my hands. I do not think I have any jurisdiction to order the Crown to pay costs in the cases in which it has been successful,

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but I think that in the circumstances the Crown ought to pay the costs of all these appeals including those in which it has been successful.

Solicitors: *The Solicitor of Inland Revenue; Nicholson, Freeland & Shepherd; Rawle, Johnstone & Co., for Parkinson, Slack & Needham, Manchester; Bird & Bird.*

J. R.

C. A.

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May 14, 15.

[IN THE COURT OF APPEAL.]

PHILLIPS *v.* BRITANNIA HYGIENIC LAUNDRY COMPANY, LIMITED.

Highway—Light Locomotive—Local Government Board Regulations—Breach—Penalty—Damage to Vehicle—Right of Action—Locomotives on Highways Act, 1896 (59 & 60 *Vict. c.* 36), *ss.* 6, 7—*Motor Cars (Use and Construction) Order*, 1904, *art. II., cl.* 6.

By s. 6, sub-s. 1, of the Locomotives on Highways Act, 1896, the Local Government Board is empowered to make regulations with respect to the use of light locomotives on highways, and their construction, and the conditions under which they may be used.

By s. 7: "A breach of any . . . . regulation made under this Act . . . . may, on summary conviction, be punished by a fine not exceeding 10*l.*"

By art. II., cl. 6, of the Motor Cars (Use and Construction) Order, 1904, made under s. 6 of the above Act: "The motor car and all the fittings thereof shall be in such a condition as not to cause, or to be likely to cause, danger to any person on the motor car or on any highway."

A motor lorry, being a light locomotive within the meaning of the Act and a motor car within the meaning of the Order, was being driven along a highway. Through no fault of its owners the lorry was in such a condition as to cause danger to persons on the lorry in that one of its axles was defective. The axle broke, and a wheel came off and damaged another vehicle.

In an action by the owner of the damaged vehicle against the owners of the lorry for a breach of art. II., cl. 6, of the Order:—

Held, that it was not intended by the Act or the Order that every one injured through a breach of the Order should have a right of action for damages; but that the duty imposed by the Order was a public duty only to be enforced by the penalty imposed for a breach of it, and not otherwise.

Judgment of Divisional Court [1923] 1 K. B. 539 affirmed.

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APPEAL from the judgment of a Divisional Court. (1)

The plaintiff brought an action in the Lambeth County Court against the defendants in the following circumstances: While the defendants' servant was driving their motor lorry in Camberwell New Road, one of the axles broke in two, a wheel came off, ran along the road and struck and damaged the plaintiff's van. About seven weeks before this the defendants had sent the lorry to the makers, Messrs. Thornycroft, a firm of admitted competence and repute, to be overhauled and repaired. Messrs. Thornycroft's men replaced one worn axle with a new one, and rethreaded and annealed the other, which was seen to be defective; they did not consider it necessary to replace it with a new axle. The repairs, in respect of which no restriction was put by the defendants, cost nearly 200*l*. The motor lorry was sent back to the defendants two days only before the accident.

The plaintiff's particulars of claim in the action were based on the alleged negligence of the defendants, but at the trial the plaintiff also relied upon other grounds, the main one being that the defendants had been guilty of a breach of art. II., cl. 6, of the Motor Cars (Use and Construction) Order, 1904, made under the Locomotives on Highways Act, 1896 (2), and that the breach of the regulation caused the damage.

(1) [1923] 1 K. B. 539.

(2) Locomotives on Highways Act, 1896, s. 6, sub-s. 1: "The Local Government Board may make regulations with respect to the use of light locomotives on highways, and their construction, and the conditions under which they may be used." . . . .

Sect. 7: "A breach of any . . . . regulation made under this Act . . . . may, on summary conviction, be punished by a fine not exceeding 10*l*."

The Motor Cars (Use and Construction) Order, 1904, dated March 9, 1904 [1904. No. 315], is addressed to the County Councils of the several Administrative Counties in England and Wales, the Common Council of the City of London, the Councils of the several County Boroughs, Urban District Councils, and Rural District Councils acting as highway authorities, and all others whom it may concern. It recites ss. 6 and 7 of the Locomotives on Highways Act, 1896 (thereinafter referred to as the Act of 1896), and that in consequence of the passing of the Motor Car Act, 1903 (thereinafter called the Act of 1903), it was expedient that former regulations should be rescinded and that other provision should be made with respect to the use of motor cars on highways, their construction, and the conditions under which they may be used; and after defining certain terms in art. I., it proceeds

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The county court judge held that the defendants were not negligent, but that Messrs. Thornycroft were negligent in not having replaced the defective axle with a new one, and he gave judgment for the plaintiff for 17*l.* 10*s.*, basing his

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to order as follows in art. II.: "No person shall cause or permit a motor car to be used on any highway, or shall drive or have charge of a motor car when so used, unless the conditions hereinafter set forth are satisfied; namely:—

"(1.) The motor car, if it exceeds in weight unladen 5 cwt., shall be capable of being so worked that it may travel either forwards or backwards.

"(2.) The motor car shall not exceed 7ft. 2in. in width, such width to be measured between its extreme projecting points.

"(3.) The tire of each wheel of the motor car shall be smooth and shall, where the same touches the ground, be flat and of the width following, namely:—

"(*a*) if the weight of the motor car unladen exceeds 15 cwt., but does not exceed one ton, not less than 2½in.;

"(*b*) if such weight exceeds one ton, but does not exceed two tons, not less than 3in.;

"(*c*) if such weight exceeds two tons, but does not exceed three tons, not less than 4in.

"Provided that where a pneumatic tire or other tire of a soft or elastic material is used the conditions hereinbefore set forth with respect to tires shall not apply.

"(4.) The motor car shall have two independent brakes in good working order, and of such efficiency that the application of either to the motor car shall cause two of its wheels on the same axle to be so held that the wheels shall be effectually prevented from revolving, or shall have the same effect in stopping the motor car as if such wheels were so held. Provided that in the case of a motor car having less than four wheels this condition shall apply as if, instead of two wheels on the same axle, one wheel was therein referred to.

"(5.) Where the weight of a motor car unladen exceeds 15 cwt. and the motor car is fitted with tires other than pneumatic tires or tires of a soft or elastic material, the weight of the motor car unladen shall be painted in one or more straight lines upon some conspicuous part of the right or off side of the motor car in large legible letters in white upon black or black upon white, not less than one inch in height.

"(6.) The motor car and all the fittings thereof shall be in such a condition as not to cause, or to be likely to cause, danger to any person on the motor car or on any highway.

"(7.)—(i) The lamp to be carried attached to the motor car in pursuance of s. 2 of the Act of 1896 shall be so constructed and placed as to exhibit, during the period between one hour after sunset and one hour before sunrise, a white light visible within a reasonable distance in the direction towards which the motor car is proceeding or is intended to proceed, and to exhibit a red light so visible in the reverse direction. The lamp shall be placed on the extreme right or off side of the motor car in such a position as to be free from all obstruction to the light." . . . .

decision on the defendants' breach of above-mentioned art. II., cl. 6, which breach, as he found, caused the damage to the plaintiff.

On appeal the Divisional Court (McCardie and Bailhache JJ.) reversed the judgment of the county court judge and entered judgment for the defendants.

The plaintiff appealed.

Harney K.C., *Martin O'Connor* and *J. P. Rutherford* for the appellant. The effect of s. 6 of the Locomotives on Highways Act, 1896, and of art. II., cl. 6, of Motor Cars (Use and Construction) Order, 1904, is that the respondents had no right to bring their lorry upon the highway. The Act enables regulations to be made with respect to the conditions under which light locomotives (which description the respondents' vehicle answered) may be used. The sixth clause of the Local Government Board's Order, art. II., is that the car and all its fittings shall be in such a condition as not to cause, or be likely to cause, danger to any person on the motor car or on any highway. The respondents' lorry was in such a condition that it was very likely to cause danger to persons on the lorry and on the highway. Therefore it was on the highway without lawful justification. In other words it was a nuisance, and any damage caused by it gives a cause of action at common law: *Sadler* v. *South Staffordshire Tramways Co.* (1)

Secondly the breach of a statutory obligation imposed for the benefit of a class of persons gives a cause of action to any person aggrieved by the breach who can bring himself within the class: *Couch* v. *Steel* (2); *Groves* v. *Lord Wimborne.* (3) The class may be a large one; it may include the public lawfully using highways, if that is the intention of the Legislature. It was the intention of the Legislature in passing the Locomotives on Highways Act, 1896, and authorizing the conditions in the Local Government Board's Order, to confer a right of action upon any person aggrieved

(1) (1889) 23 Q. B. D. 17. (2) (1854) 3 E. & B. 402.
(3) [1898] 2 Q. B. 402.

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by a breach of the conditions. This is clear from the history of the legislation affecting locomotives on highways. The Locomotive Act, 1861 (24 & 25 Vict. c. 70), by s. 5 enabled a Secretary of State to restrict or prohibit the use of locomotives on highways if dangerous to the public. By ss. 9 and 11 it imposed conditions on the user and fines for the breach of those conditions. Then by s. 13 it enacted that nothing in the Act should authorize any person to use upon a highway a locomotive engine so constructed or used as to cause a nuisance and that every person so using an engine should, notwithstanding the Act, be liable to an indictment or an action. By s. 2 of the Locomotives Act, 1865 (28 & 29 Vict. c. 83), ss. 5, 9, and 11 of the Act of 1861 were repealed and in lieu thereof it was provided by s. 3 that every locomotive propelled by any other than animal power on any public highway should be worked according to the rules and regulations, six in number, therein set out, for breach of any of which the penalty of 10*l.* was imposed; and it was provided by s. 12 that nothing in the Act should authorize any person to use a locomotive so constructed or used as to be a public nuisance at common law, and that nothing should affect the right of any person to recover damages in respect of any injury he might have sustained in consequence of the use of a locomotive. It could hardly be disputed that for an injury caused by a breach of s. 3 an action for damages would have lain.

The Locomotives Act, 1865, no longer applies to those vehicles which by s. 1 of the Locomotives on Highways Act, 1896, are called light locomotives, and instead of the regulations in s. 3 of the Act of 1865 are substituted the regulations of the Local Government Board under the Act of 1896; but in the absence of express enactment to the contrary, it is to be assumed that the remedies for breach of the regulations in force before the Act of 1896 are applicable to a breach of the regulations of the Local Government Board made under that Act.

[*Stevens* v. *Evans* (1); *Stevens* v. *Jeacocke* (2); *Gorris* v.

(1) (1761) 2 Burr. 1152, 1157. (2) (1848) 11 Q. B. 731.

Scott (1); *Tarry* v. *Ashton* (2); and *Mullis* v. *Hubbard* (3) were also cited.]

Doughty for the respondents was not called upon.

BANKES L.J. This is an appeal from the Divisional Court reversing the county court judge in an action brought by the plaintiff for damage done to his motor van. The axle of the defendants' motor lorry broke and caused the damage. The action in the county court was founded on an alleged breach of a statutory provision contained in the Motor Cars (Use and Construction) Order, 1904, and alternatively on the alleged negligence of the defendant. The county court judge absolved the defendant from negligence in relation either to the management of the motor lorry or to the state of its axle, but he found negligence on the part of the repairers to whom the motor lorry had been sent, in not having executed the repairs efficiently, and gave judgment for the plaintiff on the ground that the lorry was not in the condition required by cl. 6 of art. II. of the Order. On an appeal by the defendant the Divisional Court reversed this judgment. The plaintiff appeals to this Court.

I agree with the conclusion of the Divisional Court. If the judgment of the county court judge were to stand it would have very far reaching consequences. It is unnecessary to consider what they would be, as in this case there is only one point to be considered, and that has long been governed by well established rules; and when those rules are applied to the facts of this case, it is clear that the Divisional Court came to the right conclusion.

The only point of substance argued for the appellant was that the Motor Cars (Use and Construction) Order, 1904, conferred on him a statutory right of action for breach of its conditions. Two well known rules relate to this question; the first is stated by Kennedy L.J. in *Dawson & Co.* v. *Bingley Urban Council* (4) in these words: "Now, the general law as to the remedy of a person who has been injured by the

(1) (1874) L. R. 9 Ex. 125.
(2) (1876) 1 Q. B. D. 314.
(3) [1903] 2 Ch. 431.
(4) [1911] 2 K. B. 149, 159.

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infringement of a statutory right or the breach of a statutory obligation for his benefit is clear. Where the statute has not in express terms given a remedy, the remedy which by law is properly applicable to the right or the obligation follows as an incident. The law is, I think, correctly stated in Addison on Torts, 8th ed., p. 104, referring to Comyn's Digest: 'In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law': Com. Dig. Action upon Statute (F). Accordingly, where the statute is silent as to the remedy, the Legislature is to be taken as intending the ordinary result; and the proper remedy for breach of the statute is an action for damages and, in a proper case, for an injunction." In these cases it may be material to consider whether the right conferred or the act prohibited is for the benefit of a particular class of persons or of the public generally. The second rule is thus stated by Lord Halsbury in *Pasmore* v. *Oswaldtwistle Urban Council* (1): "The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe* v. *Bridges*. (2) He says: 'Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.'" In the same case of *Pasmore* v. *Oswaldtwistle Urban Council* (3) Lord Macnaghten said: "Whether the general rule is to prevail, or an exception to the general rule is to be admitted, must depend on the scope and language of the Act which creates the obligation and on considerations of policy and convenience." In the case we are considering the statute creates an obligation and provides a remedy for its non-observance, and the question is whether the scope and

(1) [1898] A. C. 387, 394. (2) (1831) 1 B. & Ad. 847, 859.
(3) [1898] A. C. 397.

language of the statute indicate that the general rule is to prevail so that the remedy provided is the only remedy, or whether an exception to that general rule is to be admitted. The order of the Local Government Board was made under s. 6 of the Locomotives on Highways Act, 1896, which empowered the Local Government Board to make regulations with respect to the use of light locomotives on highways, their construction, and the conditions under which they may be used. Sect. 7 of the Act provides that a breach of any regulation made under the Act may be punished by a fine not exceeding 10*l*. The language of the Act includes the expressions the "use of light locomotives" their "construction" and "conditions under which they may be used"; and its scope is the public user of highways, which has been for years subject to rules regulating and controlling it. Thus the Act deals with rights which have always been sufficiently protected by the common law. Under this Act the Local Government order was made. It is divided into sections or articles, five in number. The provision relied on is art. II.: "No person shall cause or permit a motor car to be used on any highway, or shall drive or have charge of a motor car when so used, unless the conditions hereinafter set forth are satisfied." Then follow the conditions on which a motor car may be used on any highway. They are contained in seven clauses. It is clear that some of them are introduced not to protect persons using the highway but to preserve the highway itself; those for instance relating to the width of wheels and the weight of motor cars. If the appellant's contention is to prevail every one injured by a motor car which does not comply with the regulations has a right of action. There is no reason for differentiating between those who are injured as a legal consequence of a breach from those who are injured in fact irrespectively of the breach of the regulations. Take cl. 7 for example. That clause provides that a car must have lamps exhibiting a white light in front and a red light in the rear. According to the appellant's contention a foot passenger crossing in front of a motor car would have a right of action if injured without any

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negligence of the driver, merely because the car had no red light in the rear. That cannot have been the intention of the Legislature. The absence of a red light in the rear may concern the safety of the car itself, or it may be a wise police regulation for other vehicles overtaking it, but it cannot affect the safety of a foot passenger passing in front of the car. This seems to indicate that it is not the intention of the Act to confer a right of action on every person injured by a car which does not conform to the regulations and to confer this right even though the breach of the regulations has no effect on the injury of which he complains. The matter might have been more doubtful if cl. 6 had stood alone. It provides that the car and all its fittings "shall be in such a condition as not to cause, or to be likely to cause, danger to any person on the motor car or on any highway." We have not to consider the case of a person injured on the highway. The injury here was done to the appellant's van; and the appellant, a member of the public, claims a right of action as one of a class for whose benefit cl. 6 was introduced. He contends that the public using the highway is the class so favoured. I do not agree. In my view the public using the highway is not a class; it is itself the public and not a class of the public. The clause therefore was not passed for the benefit of a class or section of the public. It applies to the public generally, and it is one among many regulations for breach of which it cannot have been intended that a person aggrieved should have a civil remedy by way of action in addition to the more appropriate remedy provided, namely a fine. In my opinion therefore this case is not an exception to the general rule; that rule applies, and the appeal must be dismissed.

ATKIN L.J. I am of the same opinion. This is an important question, and I have felt some doubt upon it, because it is clear that these regulations are in part designed to promote the safety of the public using highways. The question is whether they were intended to be enforced only by the special penalty attached to them in the Act. In my

opinion, when an Act imposes a duty of commission or omission, the question whether a person aggrieved by a breach of the duty has a right of action depends on the intention of the Act. Was it intended to make the duty one which was owed to the party aggrieved as well as to the State, or was it a public duty only? That depends on the construction of the Act and the circumstances in which it was made and to which it relates. One question to be considered is, Does the Act contain reference to a remedy for breach of it? Prima facie if it does that is the only remedy. But that is not conclusive. The intention as disclosed by its scope and wording must still be regarded, and it may still be that, though the statute creates the duty and provides a penalty, the duty is nevertheless owed to individuals. Instances of this are *Groves* v. *Lord Wimborne* (1) and *Britannic Merthyr Coal Co.* v. *David.* (2) To my mind, and in this respect I differ from McCardie J., the question is not to be solved by considering whether or not the person aggrieved can bring himself within some special class of the community or whether he is some designated individual. The duty may be of such paramount importance that it is owed to all the public. It would be strange if a less important duty, which is owed to a section of the public, may be enforced by an action, while a more important duty owed to the public at large cannot. The right of action does not depend on whether a statutory commandment or prohibition is pronounced for the benefit of the public or for the benefit of a class. It may be conferred on any one who can bring himself within the benefit of the Act, including one who cannot be otherwise specified than as a person using the highway. Therefore I think McCardie J. is applying too strict a test when he says (3): "The Motor Car Acts and Regulations were not enacted for the benefit of any particular class of folk. They are provisions for the benefit of the whole public, whether pedestrians or vehicle users, whether aliens or British citizens, and whether working or walking or standing upon

(1) [1898] 2 Q. B. 402. (2) [1910] A. C. 74.
(3) [1923] 1 K. B. 547.

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the highway." Kelly C.B. in stating the argument for the defendant in *Gorris* v. *Scott* (1) refers to the obligation imposed upon railway companies by s. 47 of the Railways Clauses Consolidation Act, 1845, to erect gates across public carriage roads crossed by the railway on the level, and to keep the gates closed except when the crossing is being actually and properly used, under the penalty of 40*s.* for every default. It was never doubted that if a member of the public crossing the railway were injured by the railway company's breach of duty, either in not erecting a gate or in not keeping it closed, he would have a right of action. Therefore the question is whether these regulations, viewed in the circumstances in which they were made and to which they relate, were intended to impose a duty which is a public duty only or whether they were intended, in addition to the public duty, to impose a duty enforceable by an individual aggrieved. I have come to the conclusion that the duty they were intended to impose was not a duty enforceable by individuals injured, but a public duty only, the sole remedy for which is the remedy provided by way of a fine. They impose obligations of various kinds, some are concerned more with the maintenance of the highway than with the safety of passengers; and they are of varying degrees of importance; yet for breach of any regulation a fine not exceeding 10*l.* is the penalty. It is not likely that the Legislature, in empowering a department to make regulations for the use and construction of motor cars, permitted the department to impose new duties in favour of individuals and new causes of action for breach of them in addition to the obligations already well provided for and regulated by the common law of those who bring vehicles upon highways. In particular it is not likely that the Legislature intended by these means to impose on the owners of vehicles an absolute obligation to have them roadworthy in all events even in the absence of negligence. For these reasons I think the appeal should be dismissed.

YOUNGER L.J. I entirely agree. Many points were touched on by the Divisional Court and ventilated by

(1) L. R. 9 Ex. 125, 128.

Mr. O'Connor here, but on one only have I found any difficulty, and that has been fully discussed by Bankes and Atkin L.JJ. With them I am satisfied that a mere breach of art. VI. by the defendant does not give any cause of action to the plaintiff. It is true that the article has been broken. It is true also that the plaintiff has, through the breach of the statutory duty imposed by the article, sustained damage, not, so far as this action is concerned, to himself personally, but to his own motor vehicle. Yet although the regulation is so expressed as to indicate that the framers had in view the possibility of damage resulting to persons using the highway, I am nevertheless driven to the conclusion on a survey of the Act and the regulation that, in the words of Lord Cairns in *Atkinson* v. *Newcastle Waterworks Co.* (1): "It was no part of the scheme of this Act to create any duty which was to become the subject of an action at the suit of individuals, to create any right in individuals with a power of enforcing that right by action."

I agree therefore that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *J. Nixon Watts & Co.*
Solicitors for respondents: *Lewis Barnes & Co.*

(1) (1877) 2 Ex. D. 441, 446.

W. H. G.

C. A.
1923
June 27.

[IN THE COURT OF APPEAL.]

CHELLEW *v.* BROWN.

[1922. C. 4234.]

Practice—Security for Costs—Misdescription of Plaintiff's Residence in Writ —Absence of fixed Residence.

The fact that a plaintiff has given as his address in the writ an address which is not his is not a ground for ordering him to give security for costs if the misstatement was innocent and made without any intention to deceive; nor is the fact that the plaintiff has no fixed place of abode any ground for making such an order.

APPEAL from Horridge J. at chambers.

The plaintiff, a master mariner, sued his employers for wrongful dismissal. In the writ it was stated that he resided at 87 Westbourne Terrace, London. In fact he was not residing there at the date of the writ, and it was his sister's house not his. But he had stayed there with her for a fortnight about three months before he commenced the action. When not on a voyage he lived in lodgings at different places, and had no permanent home in England. He was not possessed of any substantial property within the jurisdiction. In giving the address which he did upon the writ he gave the best which he could under the circumstances, and he did it without any intention to mislead. On an application at chambers that the plaintiff should be ordered to give security for costs of the action Horridge J. made the order on the ground that he had no fixed place of abode, and that the statement in the writ as to his place of residence was a misdescription.

The plaintiff appealed.

Done for the appellant. The address of the plaintiff, which by Order IV., r. 1, is required to be indorsed on the writ, was no doubt wrongly described, but the misdescription was free from any intention to deceive. As he had no permanent residence it was the best address that he could give, and a communication sent to him there was more likely to reach

him than if sent anywhere else. It is a mistake to suppose that the fact of the plaintiff having no fixed abode is a ground for ordering him to give security. It is true that in *Calvert* v. *Day* (1), where the plaintiff, a hawker and pedlar, who had no fixed place of abode but when not on the road generally lived in Liverpool, described himself in the bill as of a certain street in London, Lord Abinger, when ordering him to find security for costs, used language suggesting that the absence of a fixed residence was enough. He said: "If an attorney get a hawker and pedlar to be made plaintiff, he ought to give security for costs." But that case was shortly afterwards explained by Alderson B. in *Fraser* v. *Palmer* (2) to have proceeded on the ground that the plaintiff had falsely misstated his residence and so had been guilty of a fraud upon the Court. He said: "It cannot be contended that a person is to give that security on the mere ground that he is in the habit of moving from place to place. The evident meaning of Lord Abinger's dictum in *Calvert* v. *Day* (1) is this: that it is no excuse for a man to say that he is a hawker and pedlar, in order to give a false description as to his place of residence."

[He was stopped by the Court.]

Pritt for the respondents. The principle underlying the decisions on the subject of security for costs is that the order should be made if, owing to the plaintiff having no fixed residence or having misdescribed his residence, there is likely to be a difficulty in finding him and consequently in enforcing any order for the payment of costs that may be made against him in the event of his being unsuccessful in the action. The rule is correctly stated in the Annual Practice for 1923, p. 1310: "If the plaintiff's place of residence . . . . is incorrectly stated in the writ of summons he may be ordered to give security for costs. . . . . And security for costs may also be required from a plaintiff who appears to have no permanent residence." The plaintiff here had no fixed residence. In *Calvert* v. *Day* (3) it was contended for the defendant that "the party being a hawker and pedlar was

(1) (1836) 2 Y. & C. Ex. 217, 218. (2) (1838) 3 Y. & C. Ex. 279, 280.
(3) 2 Y. & C. Ex. 217.

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in itself a sufficient reason for ordering him to give security for costs," and Lord Abinger seemed to assent to that contention, while Alderson B.'s subsequent explanation of that case is very unsatisfactory, for the difficulty of finding a plaintiff who has no fixed residence is not increased by stating that he resides at a place where he does not. But if this case is to be treated as one of misdescription the order for security ought to be made, notwithstanding that the misdescription was innocent. If the plaintiff's address is incorrectly stated in the writ the practical difficulty of finding him is just the same whether the incorrectness is due to intention or to mistake.

BANKES L.J. In my opinion the order of the learned judge in this case ought not to be allowed to stand, for if it were it might be used as a precedent which would have the effect of preventing a number of sailors from ever bringing an action at all. The facts of the case are these : The plaintiff is a master mariner who was employed by the defendants to take some tugs out to Australia. On the way he called at Southampton, and while there he was for some reason or other dismissed. He then brought an action for wrongful dismissal. The writ was issued on September 28, 1922, and in that writ it was stated that he resided at 87 Westbourne Terrace, London. He appears to have got some other employment, and in April, 1923, as he expected to be going on a voyage to South America, he obtained an order for his examination on commission on the ground that he might be absent from this country when the action came on for trial. In the course of that examination he stated that he expected to be back in two or three months' time, that he had no permanent home in England, that he was for the time being residing at 7 Chepstow Villas, London, in a lodging, that he expected his wife might stop on there while he was away, that the address which he gave in the writ, 87 Westbourne Terrace, was his sister's house, that he had never lived there himself, but had stayed there with her for about a fortnight in June, 1922, that he was not residing there in September, 1922, and that he had

no property. On those facts an application was made at chambers for an order that the plaintiff should give security for costs, and Horridge J. made the order upon the ground that he had no fixed place of abode and that he had misdescribed his residence in the writ. Now as far as I have been able to ascertain from an examination of the authorities there does not appear to be any case in which the Court has, in the exercise of its discretion, made an order for security on the ground of misdescription of the plaintiff's residence where that misdescription was innocent and without any intention to deceive the Court or to evade the possible consequences of the litigation. In the present case it may be that the address given in the writ was a misdescription in the sense that it was not his real residence, because he had no residence at all, but I cannot see any evidence that it was given with any intention to deceive. On the contrary it seems to me to have been given because it was the most likely place at which information as to his whereabouts could be obtained, and under those circumstances I do not think it would be right for the Court to order the plaintiff to give security. In *Fraser* v. *Palmer* (1) Alderson B., after saying that "If a plaintiff gives the right description of his place of abode when he files his bill, his circulating about afterwards is immaterial," goes on: "It is a different thing if he gives a false statement of his residence, he is then guilty of a fraud on the Court, and on that ground is made to give security for costs. It cannot be contended that a person is to give that security on the mere ground that he is in the habit of moving from place to place." In *Redondo* v. *Chaytor* (2) Baggallay L.J. in the course of his judgment said: "It is well known that in all proceedings in Chancery, whether commenced by bill or petition, it was necessary to state fully in the bill or petition the name and residence of the person instituting the proceedings. . . . If the plaintiff did not correctly state his name and residence in his bill or petition, it was enough to enable the Court to order him to give security for costs." By the expression "did not correctly state" it is

(1) 3 Y. & C. Ex. 279.

(2) (1879) 4 Q. B. D. 453, 458.

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clear that he meant "intentionally misstated," for he refers by way of illustration to *Swanzy* v. *Swanzy* (1), where the plaintiff had taken lodgings at one place under one name and at another place under another name, obviously with the fraudulent intention of concealing her place of residence. And in *In re Sturgis* (*British*) *Motor Power Syndicate* (2), where an application was made that a person presenting a petition for the winding up of a company should be ordered to give security for costs on the ground that he had given a false address in the petition, Chitty J. made the order, as it appeared that "The petitioner could not be found at the address given and his solicitor was unable to give the petitioner's private address." Those are only a few instances of the many cases that might be found in the books in which the Court has exercised its discretion in favour of making the order where there has been something in the nature of an intention to deceive. In my opinion the order of Horridge J. cannot be supported upon either of the grounds on which it was made, either that the plaintiff has misdescribed his residence in the writ, or that he had in fact no permanent residence. The appeal must be allowed.

YOUNGER L.J. I am entirely of the same opinion. It is quite clear that the plaintiff had not at any relevant time any permanent address in this country, and it is also clear from his evidence taken on commission that the address which he gave of his sister's house in Westbourne Terrace was the best address for the purposes of the defendants that under the circumstances it was possible for him to give. There was no intention on his part to mislead, and therefore no misdescription of the kind which would justify an order for security.

Appeal allowed.

Solicitors for the appellant: *Speechley, Mumford & Craig.*
Solicitors for the respondents: *Ince, Colt, Ince & Roscoe.*

(1) (1858) 4 K. & J. 237. (2) (1885) 53 L. T. 715.

J. F. C.

CHARD *v.* BUSH.

1923
July 9.

Local Government—Poor Law—District Council—Membership—Receipt of Union or Parochial Relief—Disqualification—Relief by Way of Loan—Poor Law Amendment Act, 1834 (4 *&* 5 *Will.* 4, *c.* 76), *s.* 58—*Local Government Act*, 1894 (56 *&* 57 *Vict. c.* 73), *s.* 46, *sub-s.* 1 (*b*), *sub-s.* 8.

By s. 46, sub-s. 1, of the Local Government Act, 1894, a person is disqualified for being elected or being a member or chairman of a council of a parish or of a district other than a borough or a board of guardians, "if he . . . . has within twelve months before his election, or since his election, received union or parochial relief."

Relief which is given by way of loan only is still relief within the meaning of the above section, and its receipt by way of loan acts as a disqualification as therein provided.

CASE stated by justices for the county of Monmouth.

An information was preferred by the respondent, Elijah Bush, against the appellant, Joseph Chard, for that on nine specified days between April 24, 1922, and August 28, 1922, at Blaina in the parish of Aberystwyth in the county of Monmouth, he did unlawfully act as a member of the Nantyglo and Blaina Urban District Council, he being a person disqualified from being so elected and from being a member of that council in that he had within twelve months before his election or since his election received union and parochial relief against the form of the statute in such case made and provided. Upon the hearing of the information the following facts were proved or admitted:—

(*a*) On April 3, 1922, the appellant was elected a member of the council.

(*b*) After his election the appellant acted as a member of the council on the days specified in the information.

(*c*) The appellant within twelve months before his election or since his election received from the guardians of the Bedwellty Union relief to the amount of 30*l.*

(*d*) Such relief was given to the appellant by way of loan in accordance with the resolution of the guardians dated March 23, 1922, which was in the following terms: "That all relief allowed in cases of unemployment be declared on loan subject to an appeal to the

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Board." This resolution was reaffirmed on September 14, 1922, by the following resolution: "That all relief to the unemployed be declared on loan as heretofore."

(*e*) The appellant did not twelve months before his election or since his election receive any relief from the Bedwellty guardians or from any other guardians other than the relief mentioned above.

(*f*) The appellant repaid to the guardians sums amounting to 12*l.* on account of this relief.

(*g*) The appellant was compelled to apply for such relief by reason of unemployment arising from trade depression.

(*h*) At the date of the election in consequence of such trade depression a large proportion of the electorate of the Nantyglo and Blaina Urban District were unemployed and in receipt of relief from these or other guardians by way of loan or otherwise.

For the respondent it was contended that such relief was union and parochial relief within the meaning of the Local Government Act, 1894, s. 46, sub-s. 1 (*b*), and that the appellant was disqualified under the sub-section from acting as a member of the council and was liable to be convicted under the Local Government Act, 1894, s. 46, sub-s. 8.

For the appellant it was contended that such relief by virtue of the Poor Law Amendment Act, 1834, s. 58 (1) and art. XIII. of the Relief Regulation Order, 1911 (2), was to be considered to be and was a loan from the guardians to the appellant and was not union or parochial relief within the Local Government Act, 1894, s. 46, sub-s. 1 (*b*). (3)

(1) Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 58: "Any relief, or the cost price thereof, which shall be given to or on account of any poor person, ... and which the [Poor Law Commissioners] shall by any rule, order, or regulation declare or direct to be given or considered as given by way of loan, ... shall be considered and the same is hereby declared to be a loan to such poor person."

(2) Poor Relief Regulation Order, 1911, Art. XIII.: "No relief which may be contrary to the Regulations contained in this Order shall be given by way of loan; but any relief which may be given . . . . in accordance with those Regulations may, if the Guardians think fit, be given by way of loan."

(3) See Headnote.

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The justices were of opinion that such relief, though given to the appellant by way of loan, was union or parochial relief within the meaning of the Local Government Act, 1894, s. 46, sub-s. 1 (*b*), and that the appellant by the receipt thereof was disqualified thereby from acting as a member of the council on the days stated in the information, and they accordingly convicted the appellant.

Upon the application of the appellant under the Summary Jurisdiction Act, 1857, s. 2, and the Summary Jurisdiction Act, 1879, s. 33, the justices stated a case for the opinion of the High Court.

The question for the opinion of the Court was whether upon the above statements of facts the justices came to a correct determination in point of law.

Harold Morris K.C. and *Baker Welford* for the appellant. The relief here was given by way of loan, and according to the Poor Law Amendment Act, 1834, s. 58, any relief so given "shall be considered and is hereby declared to be a loan to such poor person." By the Relief Regulation Order, 1911, art. XIII., any relief given to any person in accordance with the regulations "may if the guardians think fit, be given by way of loan." The effect of this statute, coupled with the regulation, is that a contractual relation is established between the guardians and the recipient. The grant ceases to be relief and becomes a loan, which is recoverable by the guardians, as provided in s. 59 of the Poor Law Amendment Act, 1834, and it may by virtue of the Poor Law Amendment Act, 1848, s. 8, be recovered in the county court.

[SANKEY J. In both those Acts the loan is described as "relief."]

Yes; but it is relief only while it remains in the hands of the guardians. When it reaches the recipient it becomes a loan and is no longer relief.

By the Divided Parishes and Poor Law Amendment Act, 1876, s. 23, trustees or other persons who are bound to make payments to a poor person may pay the cost of relief out of the instalments or annuity so far as these are due; and by

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the Poor Law Amendment Act, 1879, s. 1, those provisions are not to apply to a member of a benefit or friendly society who has relatives dependent on him. Thus relief is no longer relief in such cases, but becomes a loan. In *Norman's Case* (1) it was successfully contended that a voter to whom money had been advanced by the guardians, but who had repaid it, had not been in receipt of parochial relief so as to invalidate his vote. As in the present case, a mere debt had there been incurred between the recipient and the parish. We admit the liability to repay the debt to the guardians, and part of it has in fact been repaid. In the *Oldham Case, In re Whatnough* (2), a coffin supplied to a voter to bury a child was held to be a form of parochial relief sufficient to disqualify, and the vote was struck off. But in the same case, *In re Joshua Smith* (2), where an order for a coffin had been given to a voter under the promise that he would pay it back by instalments each week, Blackburn J. refused to strike off the vote, although he reserved the point for the Court of Common Pleas. No further report of the case is to be found.

The distinction between "relief" and "relief by way of loan" is clearly brought out in these two cases. The words of the Poor Law Amendment Act, 1834, s. 58, show an intention to save the recipient from the consequences of receiving parochial relief.

Macmorran K.C. and *W. H. Williams* for the respondent. Relief by way of loan does not cease to be relief because the payment is not made as a gift. Guardians are not money-lenders, and the authority contained in the Poor Law Amendment Act, 1834, s. 58, to grant relief, is granted with a view to its recovery by the guardians as a debt in a proper case. The first statute which deals with loans to paupers is the Poor Relief Act, 1819 (59 Geo. 3, c. 12): s. 29 of that Act empowers overseers to give relief by way of loan and prescribes proceedings for repayment. The Poor Law Amendment Act, 1834, s. 58, followed, and s. 59 of that Act provides a special remedy for the recovery of relief by way of loan, while s. 8

(1) (1837) Knapp & O. 114. (2) (1869) 1 O'M. & H. 161.

of the Poor Law Amendment Act, 1848, contains a proviso that loans made by the guardians shall be chargeable to the common fund of the union. There is no authority directly in point, but since the Representation of the People Act, 1918, s. 9, sub-s. 1, the receipt of poor law relief only affects the status of councillors and not that of voters, in whom it no longer creates a disqualification. So far as the *Oldham Case, In re Joshua Smith* (1), is concerned, it does not appear from the report that the grant was by way of loan, there was merely a promise by the recipient to pay back in instalments.

Art. XIII. of the Relief Regulation Order, 1911, forbids guardians to grant by way of loan what they cannot grant by way of relief, and is in favour of the respondent's contention.

SANKEY J. [after stating the facts and arguments:] The point here raised is whether the appellant has received union or parochial relief within the twelve months before or since his election. If so, he is disqualified from acting as a member of the council and is liable to penalties. The first statute which is material is the Poor Law Amendment Act, 1834, which provides (s. 58) that "any relief, or the cost price thereof, which shall be given to or on account of any poor person and which the [Poor Law Commissioners] shall by any rule, order, or regulation declare or direct to be given or considered as given by way of loan . . . . shall be considered and the same is hereby declared to be a loan to such poor person." In connection with this, art. XIII. of the Poor Relief Regulation Order, 1911, directs that no relief that may be contrary to the regulations contained in the Order shall be given by way of loan: but that any relief which may be given in accordance with those regulations may, if the guardians think fit, be given by way of loan. Then the Local Government Act, 1894, s. 46, declares that the receipt of union or parochial relief within twelve months of election shall be a disqualification of membership of a district council. The appellant argues that this section does not apply, because the relief given him

(1) (1869) 1 O'M. & H. 161.

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was given "by way of loan," and in such cases, he says, s. 58 of the Act of 1834, coupled with art. XIII. of the Order of 1911, renders it no longer "relief" for purposes of disqualification but a loan only, so that the Local Government Act, 1894, s. 46, sub-s. 1, does not apply.

The respondent on the other hand contends that whether the grant is relief in the ordinary sense or by way of loan, it is in both cases "relief" within s. 46, sub-s. 1, of the Act of 1894, and that the Poor Law Amendment Act, 1834, s. 58, is not material, the "relief" not being merged in the loan. In considering this question it is important to bear in mind the words used in the various statutes which enable the guardians or overseers to give relief by way of loan. The Poor Law Amendment Act, 1834, s. 52, enabled the guardians or overseers of a parish to give poor relief, subject only to the Regulations of the Poor Law Commissioners and provided for the making of rules for the administration of that relief. Then s. 58 provides that any relief which the Commissioners declare or direct to be given by way of loan "shall be considered and is hereby declared to be given by way of loan." Relief therefore may be administered in two ways, either as a gift, or under s. 58 of the Act of 1834, when it is to be considered a loan. Different machinery exists as to the manner in which the amount may be recovered in the two cases. That is to say, in the case of relief by way of gift, the amount can be recovered if the recipient is found to be subsequently in possession of property, whereas in the case of relief by way of loan it may be recovered in manner provided by the various statutes. In my view, the relief spoken of under s. 58 does not partake of the nature of a lending transaction, but is relief which, being regarded as a loan under the statute, may be recovered in manner as the statute permits.

The guardians are not in the position of moneylenders, but have power to administer relief either by way of gift or loan. The Act of 1834, s. 59, provides one method of recovery in case of relief by way of loan—namely, by order of justices attaching wages in the hands of master or employer. Relief

by way of loan is not necessarily confined to money, because s. 58 of the Act refers to "any relief or the cost price thereof." The existence of this power to grant relief in kind to my mind weighs against the contention that the relief by way of loan is intended to be a loan only and not strictly relief. The Poor Law Amendment Act, 1848 (11 & 12 Vict. c. 110), s. 8, provides that "all relief to be granted by the guardians to any pauper upon loan, and which shall be chargeable to the common fund of the union, or to any parish therein, may be recoverable in the county court . . . . for the district on the plaint of the guardians; provided nevertheless, that the remedy already provided by law for the recovery of the relief granted on loan shall be in force and applicable to the relief so chargeable to the common fund as aforesaid."

The Divided Parishes and Poor Law Amendment Act, 1876, s. 23, provides that the trustees of any fund to the income of which the pauper is entitled may pay to the guardians out of instalments which are due the "cost incurred in the relief of such pauper accrued since the last instalment. Provided that this clause shall not have effect unless and until the guardians or their relieving officer shall have declared the relief to be given on loan."

Finally the Poor Law Amendment Act, 1879, amending the Act of 1876, provides that s. 23 of the Act of 1876 shall not apply to money which a pauper with relatives dependent on him may be entitled to receive as a member of a friendly or benefit society, and, in the case of a pauper entitled to such moneys but having no such dependants, no claim is to be made unless and until the guardians have declared the relief to be given on loan.

It would have been easy in these Acts, if it were intended that the relief should be regarded as a loan, to have so provided, instead of repeatedly using the words "relief on loan" or "relief by way of loan." In these Acts the word "relief" always appears in the primary and important place either as "relief," in which case it means a gift, or as "relief on loan" or "by way of loan," and the statutes therefore bear out the view that the grants are

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Sankey J.

throughout to be regarded as "relief." The Local Government Act, 1894, s. 46, sub-s. 1, provides generally that a person shall be disqualified if he is "in receipt of relief." The distinction between "relief" and "relief by way of loan" was by that time well understood. It was a distinction of sixty years standing, and Parliament could, if so minded, have specified that in case of relief by way of loan disqualification should not follow. On the contrary it has provided for disqualification where a person is "in receipt of relief," and the word "relief" is the primary consideration. In order that "relief by way of loan" might be recovered in a more summary way, statute has provided for the adoption of certain methods, but the initial and abiding character of relief was not thereby destroyed. The justices were right and the conviction must be upheld.

SALTER J. I agree. The Local Government Act, 1894, s. 46, sub-s. 1, disqualifies from election to a district council or membership thereof persons who have within twelve months been in receipt of union or parochial relief. The appellant here did receive union relief and prima facie appears to be disqualified. The Poor Law Amendment Act, 1834, s. 58, declares that "any relief or the cost price thereof" which the Poor Law Commissioners have declared or directed to be given or considered as given by way of loan shall be considered a loan. The meaning is that those who have received relief by way of loan shall have the same rights and liabilities as would have accrued if the relief was in fact a loan. The section does not provide that the loan shall not be regarded as relief, and relief given by way of loan is still relief for the purposes of the Local Government Act, 1894, s. 46, sub-s. 1.

SWIFT J. I agree.

Appeal dismissed.

Solicitors for appellant: *Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for respondent: *Gibson & Weldon, for Liscombe & Dawson, Newport.*

F. P. F.

[IN THE COURT OF APPEAL.]

C. A.
1923
July 17.

JOHNSON *v.* STEPHENS AND CARTER, LIMITED AND GOLDING.

Practice—Action by one of two joint Contractors—Refusal of the other to join as Plaintiff—Indemnity against Costs—Whether offer of, a condition precedent to right to join him as Defendant.

Where one of two joint contractors refuses to join as co-plaintiff in an action for a breach of the contract it is, as a general rule and in the absence of special circumstances, a condition precedent to the right of the other co-contractor to make him a defendant that he should first have offered him an indemnity against costs if he would consent to join as plaintiff; but there is an exception to that rule where the dissenting contractor has in breach of his duty to the plaintiff colluded with the defendant and brought about the breach of contract complained of.

APPEAL from Swift J. at chambers.

The plaintiff in his statement of claim in the first four paragraphs stated that he was in partnership with the defendant Golding, carrying on the business of painters and cleaners of glazed building surfaces; that in March, 1915, the defendants Stephens & Carter, Ld., entered into an agreement with the firm of Johnson & Golding that upon the company receiving any orders for work of the description done by the said firm they would give the firm notice with the necessary particulars to enable the firm to tender for the execution of the work, and that they would do their best to obtain a contract with the ultimate principals and upon obtaining it would employ the firm to execute the work; that in September, 1922, the defendants repudiated the said agreement and refused to perform it any further; and that in breach of the said agreement they had employed other persons than the said firm, including the defendant Golding personally, to execute work of the above-mentioned description without giving the firm an opportunity of tendering for the execution of it, whereby the plaintiff was deprived of the profit which he would have made. He then alleged that he requested the defendant Golding to join as plaintiff in the action, and upon his refusing to do so he made

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him a defendant as being a necessary party. He further alleged in para. 5 that the defendant company conspired with Golding that he should commit a breach of the partnership agreement and that they should commit breaches of the agreement of March, 1915, in pursuance whereof the defendant company gave all their orders for work to Golding personally or to other firms with intent to deprive the plaintiff of his interest under the said agreement, whereby the plaintiff suffered damage. The defendant Golding applied at chambers to have his name struck out of the action on the ground that the plaintiff had not offered him any indemnity against costs if he would consent to be joined as plaintiff, and he insisted that there was no valid cause of action against the defendants. Swift J. ordered Golding's name to be struck out, being of opinion that the offer of such an indemnity was a condition precedent to the right of one of two co-contractors to join the other as defendant against his will in an action for a breach of the contract.

The plaintiff appealed to the Court of Appeal.

Croom Johnson for the appellant. There is no authority for the proposition that a plaintiff suing on a joint contract cannot join his co-contractor as a plaintiff in the action against his will except upon the terms of an indemnity against costs. The judge below thought he was bound by *Cullen* v. *Knowles*. (1) The headnote to that case no doubt suggests that the offer of an indemnity is a condition precedent to such right of joinder, but it is not borne out by the decision. There an indemnity against costs had in fact been offered, and Bigham J. held that as the co-promisee had refused to join as plaintiff he might be joined as defendant. But he did not suggest that his decision would have been different if no such offer had been made. He there extended to the case of joint contractors generally the old Chancery practice relating to co-mortgagees. According to that practice one of two joint mortgagees may file a bill for foreclosure making the other a defendant: *Davenport* v. *James* (2); *Luke* v.

(1) [1898] 2 Q. B. 380. (2) (1847) 7 Hare, 249.

South Kensington Hotel Co. (1) But nothing is said in any of the cases relating to that practice about an indemnity being necessary. It may be that it is now usual to offer it, but it is not essential. In any event the order here is too wide, for Golding's name has been struck out not merely of so much of the action as related to the joint contract, but also out of that part which charged a conspiracy in para. 5, with a consequent claim against him for damages.

Barrington-Ward K.C. and *Morle* for the defendant. At common law if one of two co-contractors refused to join as plaintiff in an action on the contract, the other co-contractor was in general without remedy, he could not enforce his contract; for he could not join the dissenting contractor as defendant at all, and he could not join him as plaintiff against his will, except where the relation between the two was that of partners. In that exceptional case a dissenting contractor could be added against his will, not as defendant, but as plaintiff, though he was entitled in such case to an indemnity against costs: *Whitehead* v. *Hughes.* (2) The reason why a partner could join his co-partner against his will was that there is implied from the contract of partnership an authority to all the partners to use the firm name. In the case of co-contractors other than partners the old common law rule still subsists. There is nothing in the Judicature Act to alter it. Except for *Cullen* v. *Knowles* (3) there is no authority for a joint contractor, other than a joint mortgagee, being made an unwilling defendant even with an offer of indemnity. Bigham J. altered the common law rule without giving any authority for so doing. But if the defendant is wrong on that point, and if he can now be joined against his will as defendant, it can only be on the terms of his having been offered an indemnity if he would join as plaintiff. That is the practice that has no doubt long been acted on. On the point that the order was too wide in striking Golding's name out of the whole action, it must be conceded that the order cannot be supported.

(1) (1879) 11 Ch. D. 121. (2) (1834) 2 Cr. & M. 318.
(3) [1898] 2 Q. B. 380.

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Croom-Johnson in reply. This matter ought not to be decided on an interlocutory application, but the parties should be left to go to trial, when the propriety or impropriety of the joinder can be dealt with on the question of costs according as the case is decided one way or the other on the merits.

ATKIN L.J. The action in this case is brought against a limited company named Stephens & Carter, and one Golding, and the plaintiff now appeals from an order of the judge at chambers striking out the defendant Golding as a defendant in the action. The statement of claim in the first four paragraphs alleges as follows: [His Lordship read them.] So far that is an ordinary claim for the breach of a contract made with two joint contractors and an allegation that one of the joint contractors, being unwilling to join as plaintiff, had been made a party to the action as defendant. Then the plaintiff goes on to allege in para. 5 that the defendant company conspired and agreed with the defendant Golding that he should commit a breach of his partnership contract and that the company should commit a breach of the agreement sued on, and in pursuance thereof the defendant company gave all their orders for work to the defendant Golding personally, whereby the plaintiff lost his share of the profits, and in respect of that conspiracy he claims damages. That would I think be a claim in tort by the plaintiff's firm against the company and the individual partner. Now the defendant Golding applied that he should be struck out of the action upon the ground that the claim was in respect of damages alleged to be recoverable by the firm, and that he ought not to have been joined as defendant because, although a proposal had been made to him that he should join in the action as plaintiff, that proposal had not been accompanied by an offer of indemnity against the costs, and the learned judge adopted that view.

It appears to me that at the present day as a general rule, in the absence of special circumstances, if one of two joint contractors refuses to join as plaintiff in an action for a

breach of the contract, the party seeking to sue should offer the other an indemnity, and then if he still refuses is entitled to join him as a defendant. That is a great advance on what was the strict rule at common law, according to which one joint contractor could not join another as plaintiff in an action against his will, except where the joint contractors were partners, in which case one partner might use the names of his co-partners on his giving them an indemnity if it was asked for. An authority for that exception is to be found in *Whitehead* v. *Hughes*. (1) There the plaintiff was in partnership with one Greenwood who had become bankrupt. The plaintiff Whitehead commenced an action in the names of himself and Greenwood's assignees to recover a debt due to the firm. The action was brought against the assignees' will, but they had not applied for an indemnity against the costs, and in those circumstances it was held that the plaintiff was entitled to use the assignees' names against their will. Bayley B. said: "One of several partners has a clear right to use the names of the other partners. If they object to their names being used they may apply for an indemnity against the costs to which they might be subjected by the use of their names." It was for the dissenting partner to ask for the indemnity, not for the plaintiff to offer it. I do not think it necessary to consider whether that case is law now, whether, that is to say, one partner can use his co-partner's name as plaintiff against his will. In *Cullen* v. *Knowles* (2) one of two co-owners of a patent claimed that they were entitled to a sum of 1600*l*., and asked his fellow co-owner to join with him as plaintiff in an action to recover the money, at the same time offering him an indemnity against the costs. On the other co-owner refusing his consent he joined him as defendant, and Bigham J. held that under the circumstances there was no objection to his so doing. It is true that he did not decide that the making of an offer of indemnity was a condition precedent to a right to add the other co-owner as a defendant, but it was certainly in accordance with what had been the practice for many years past.

(1) 2 Cr. & M. 318. (2) [1898] 2 Q. B. 380.

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Atkin L.J.

Now in the present case no offer of an indemnity was made by the plaintiff, and consequently if there were no special circumstances connected with the case the defendant would have been entitled to object that the action was not properly constituted. But the rule is I think not without its exception. If one co-contractor refuses to join in an action for a breach of the contract because he has procured the breach or has acted in some way in fraud or in wrong of the other co-contractor that would, in my opinion, be a circumstance which would entitle the latter to bring an action without performing what in ordinary circumstances would be the condition precedent of offering an indemnity against costs. That is a very special circumstance but it is one which occasionally arises, and if it does arise I think the plaintiff would be entitled to frame his action in the way he has done here and dispense with the offer. But that is in substance what is alleged in the statement of claim to have happened in this case. No doubt it is not supported by any evidence at present, but the statement of claim contains a substantive complaint of this very wrongdoing, and that is an issue which has to be determined. Under these circumstances I think it would be wrong at this stage to hold that the plaintiff has no right to join Golding as a defendant without offering him an indemnity even in respect of the first four paragraphs of the claim. I think that the proper order for us to make is to discharge the order striking Golding out of the action. If at the trial the issue raised in para. 5 is decided in the plaintiff's favour the action will have been properly constituted as to the claim in paras. 1 to 4, otherwise it will not.

YOUNGER L.J. I am of the same opinion. This statement of claim is of a composite nature and contains two distinct causes of action. One is in tort alleging a conspiracy between the defendant company and Golding to procure a certain contract to be broken, whereby the plaintiff has suffered damage. So long as that portion of the statement of claim stands it seems to me that it is impossible for the Court to say that the defendant Golding is entitled to be dismissed

from the action at his own instance. But the statement of claim also contains a claim against the defendant company for breach of contract made by them with two joint contractors, of whom the plaintiff is one; and the other joint contractor having refused to join in the action the plaintiff has added him as a defendant in respect of that claim. The question then arises as to the circumstances in which one of two joint contractors is entitled to maintain an action in that form. Now I think it is clear that he has no absolute right to do so, and that he is only allowed to take that course as a matter of privilege and upon terms. What then are the terms on which that privilege is to be enjoyed? Speaking for myself I should prefer not to say that the condition of his being allowed to join the other joint contractor as a defendant is that he shall have offered him an indemnity against costs if he will allow the use of his name as plaintiff, but to state the principle rather more widely, and say that before joining his co-contractor as a defendant he must first have exhausted all reasonable means of obtaining his consent to being joined as plaintiff. No doubt in ninety-nine cases out of a hundred one of those reasonable means is the offer of an indemnity, and the absence of such an offer unexplained would in these cases be a reason for saying that the action was not properly constituted if the co-contractor was joined as a defendant. But in the hundredth case, and the present case is an instance, where the co-contractor is alleged in breach of his duty to the plaintiff to have colluded with the other party to the contract and procured a breach of it, it would not be reasonable to require the plaintiff to offer him an indemnity as a condition of being allowed to join him as a defendant. I am fortified in this view by a statement which I find made by Warrington J. in *Ellis* v. *Kerr*. (1) He there says: "It is perfectly true that authorities have been cited in support of the well-known practice and doctrine of the Court of Chancery, that if a covenant is entered into with two persons jointly by a third person, and one of those joint covenantees refuses to sue at law, the Court will

(1) [1910] 1 Ch. 529, 540.

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Younger L.J.

allow one of them to sue the covenantor, making his co-covenantee a party to the action. But that seems to me to depend upon a perfectly well known principle of equity, and to arise, as do so many equitable principles, out of the doctrine of trusts. I think it arises from this notion, that if a covenant to pay a sum of money is made with two jointly, each of them is trustee for the two and for the other, and if one as such trustee refuses to join in the action which in all honesty he is bound to bring for the benefit of his co-covenantee, then his co-covenantee is entitled to make him a party to the action in order that he may be bound, and to recover the moneys secured by the covenant." Now there is nothing said there about offering an indemnity against costs to the other co-covenantee as a condition of the plaintiff being entitled to join him as a defendant to the action. The privilege is rather based on the duty which one of two co-contractors owes to the other to concur in taking the steps necessary to recover a debt due jointly to both, and seems to suggest that the ground on which my Lord has decided this case is the sound one. Here we have an allegation made against the defendant that he has been guilty of a breach of duty to his co-contractor in that he has colluded with the company with whom he and the plaintiff had contracted with the result that the benefit of that contract has been lost to the plaintiff, and I think it plain according to all principle that if an action on the joint contract can ever be maintained in this form at all it can certainly be maintained in such circumstances as these.

Appeal allowed.

Solicitors for the appellant: *Leonard Bingham & Sharpe.*
Solicitors for the respondents: *Boyce & Evans.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1923
June 28.

In re An Arbitration between ARDEN and RUTTER.

Landlord and Tenant—Agricultural Holding—Breaches of Tenancy Agreement—Claim by Landlord for Compensation for Deterioration—Tenancy of different Portions of Holding commencing at different Dates—Time for giving Notice of Intention to claim—Termination of Tenancy—Agriculture Act, 1920 (10 & 11 *Geo.* 5, *c.* 76), *s.* 19.

In construing an obscure enactment that construction which preserves existing rights ought to be preferred.

By s. 19 of the Agriculture Act, 1920: "Where a landlord proves, to the satisfaction of an arbitrator appointed under the Act of 1908, on the termination of the tenancy of a holding, that the value of the holding has been deteriorated during the tenancy by the failure of the tenant to cultivate the holding according to the rules of good husbandry or the terms of the contract of tenancy, the arbitrator shall award to the landlord such compensation as in his opinion represents the deterioration of the holding due to such failure:

"Provided that compensation shall not be payable under this section unless the landlord has, before termination of the tenancy, given notice in writing to the tenant of his intention to claim such compensation:

"Provided also that nothing in this section shall prevent a landlord from claiming compensation for dilapidations or for the deterioration of the holding under the contract of tenancy":—

Held, that the meaning of the section taken as a whole was that the landlord should have a right of compensation for deterioration under the section if he gave a notice before the termination of the tenancy and not otherwise; but that if he had a right under contract to claim for deterioration apart from the section, nothing in the section should interfere with that right.

A tenant held a farm as a yearly tenant under the landlord upon the terms, as the arbitrator found, of an agreement in writing under which the father of the tenant had originally held the farm. On August 20, 1920, the landlord served a notice to quit upon the tenant, which expired as to the land (other than the boozy pasture) on February 2, 1922. The tenant gave up possession of the land except the boozy pasture, the tenancy of which did not expire until May 1, 1922, upon that date. On March 28, 1922, the landlord gave notice of and particulars of a counterclaim against the tenant for waste wrongly committed or permitted by the tenant and for breach of contract or otherwise, whereby he claimed for neglect in the care of hedges and ditches on the land and dirty land.

Held, that the landlord's claim was not barred by s. 19 of the Agriculture Act, 1920.

Held, also, that the boozy pasture and the rest of the farm were held under one contract of tenancy; that the contract did not finally cease under s. 10, sub-s. 7, of the Act of 1920 until May 1, 1922, the date of the

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termination of the boozy tenancy; and that the landlord's notice was therefore in time.

Swinburne v. *Andrews* [1923] W. N. 157; since reported ante, p. 483, followed.

APPEAL from the decision of the judge of the Chester County Court upon a special case stated by the arbitrator in an arbitration under the Agricultural Holdings Acts, 1908 to 1920.

The special case stated that F. Rutter, the tenant, held a farm known as the Lower House Farm situate at Clotton, Cheshire, as a yearly tenant under Capt. Baillie-Hamilton-Arden, the landlord. The farm had been held by the father of the tenant till his death in November, 1914, from Lord Haddington, the predecessor in title of the landlord, at a rent of 242*l.* 12*s.* per annum. The landlord succeeded Lord Haddington as landlord in 1917. From November, 1914, till November, 1919, the farm had been held by the tenant jointly with his brother B. Rutter at the same rent. From November, 1919, till the end of the tenancy the rent had been paid by the tenant alone. The farm was held by the tenant under an oral agreement.

It was contended by the landlord that the terms of the oral agreement were to be implied as being the same as those of an agreement in writing under which the father of the tenant had held the farm from Lord Haddington, which agreement, signed by the father of the tenant, was produced by the landlord. The agreement contained express terms to the effect (inter alia) that the tenant should cultivate the land in a husbandlike manner and protect and cut all growing fences and clean out all ditches and drains and deliver up the premises in good condition at the expiration of the tenancy.

The tenant denied that he had agreed impliedly or at all to hold upon the terms under which his father held. He contended that the terms under which his own tenancy was held were those implied by law and the custom of the country.

The arbitrator found as a fact that the tenant had the farm upon the terms of the agreement in writing under which the father of the tenant held the farm.

The landlord served a notice to quit upon the tenant on August 20, 1920, and that notice expired as to the land (other than the boozy pasture) on February 2, 1922.

The tenant gave up possession of the land upon that date.

The tenant claimed against the landlord for disturbance under s. 10 of the Agriculture Act, 1920, in November, 1921.

On March 28, 1922, the landlord gave notice of and particulars of a counterclaim against the tenant for waste wrongly committed or permitted by the tenant and for breach of contract or otherwise, whereby he claimed for neglect in the case of hedges and ditches on the land and dirty land.

The tenancy having terminated on February 2, 1922, it was contended on behalf of the tenant that the claim of the landlord was not admissible because no notice in writing of his intention to claim compensation was given by the landlord before the termination of the tenancy, and that the landlord's claim was barred by s. 19 of the Agriculture Act, 1920. (1)

(1) Agriculture Act, 1920, s. 18, sub-s. 1: "Any question or difference arising out of any claim by the tenant of a holding against the landlord for compensation payable under the Act of 1908 or for any sums claimed to be due to the tenant from the landlord for any breach of contract or otherwise in respect of the holding, or out of any claim by the landlord against the tenant for waste wrongly committed or permitted by the tenant or for any breach of contract or otherwise in respect of the holding, and any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the tenancy of the holding or arising, whether during the tenancy or on the termination thereof, as to the construction of the contract of tenancy shall be determined by arbitration under the Act of 1908."

Sub-s. 2: "Any such claim as is mentioned in this section shall cease to be enforceable after the expiration of two months from the termination of the tenancy unless particulars thereof have been given by the landlord to the tenant or by the tenant to the landlord, as the case may be, before the expiration of that period:

"Provided that, where a tenant lawfully remains in occupation of part of a holding after the termination of the tenancy, particulars of a claim relating to that part of the holding may be given within two months from the termination of th occupation. . . . ."

Sect. 19: "Where a landlord proves, to the satisfaction of an arbitrator appointed under the Act of 1908, on the termination of the tenancy of a holding, that the value of the holding has been deteriorated during the tenancy by the failure of the tenant to cultivate the holding according to the rules of good hus-

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It was argued on behalf of the tenant that the second proviso to s. 19 referred only to claims under the terms of a contract of tenancy, which were in writing or alternatively were express terms (oral or otherwise) or alternatively were express terms implied otherwise than by law and the custom of the country.

It was contended on behalf of the landlord that his claim was not barred by s. 19. It was submitted that his claim was for the breach of the terms of a contract of tenancy implied from the express terms of a previous tenancy. In the alternative it was contended that, even if the claim was for breach of terms to be implied solely by law and the custom of the country, such claim was not barred by s. 19. It was argued that the words "under the contract of tenancy" in the second proviso to s. 19 were not limited to claims under express terms or terms in writing, but extended to claims under implied terms whether implied from the terms of a previous tenancy or implied by law and the custom of the country. In support of this argument s. 33, sub-s. 7, of the Agriculture Act, 1920, was cited. Reference was also made to s. 18, sub-ss. 1 and 2, of the Act, and it was submitted that the landlord's claim came within s. 18, sub-s. 1, and that a claim having been made within two months of February 2, 1922, his claim was enforceable and determinable in the arbitration.

The question of law submitted by the arbitrator for the

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bandry or the terms of the contract of tenancy, the arbitrator shall award to the landlord such compensation as in his opinion represents the deterioration of the holding due to such failure;

"Provided that compensation shall not be payable under this section unless the landlord has, before termination of the tenancy, given notice in writing to the tenant of his intention to claim such compensation:

"Provided also that nothing in this section shall prevent a landlord from claiming compensation for dilapidations or for the deterioration of the holding under the contract of tenancy."

Sect. 33, sub-s. 7: "References to the terms, conditions, or requirements of a contract of tenancy of or of an agreement relating to a holding shall be construed as including references to any obligations, conditions, or liabilities implied by the custom of the country in respect of the holding."

opinion of the county court was, whether, the landlord not having given the notice required by s. 19 of the Agriculture Act, 1920, his claim to compensation was barred by that section.

The county court judge answered the question in the affirmative.

It was stated in the course of the proceedings before the county court judge that the tenancy of the boozy pasture did not expire until May 1, 1922.

The landlord appealed. The appeal was heard on June 28, 1923.

Hanbury Aggs and *Rice-Jones* for the landlord.

Greaves-Lord K.C. and *Austin Jones* for the tenant.

The arguments sufficiently appear from the case stated and the judgments.

LORD STERNDALE M.R. No one can be certain about the meaning of a section like the one we have to construe, and I do not profess to feel certain about it, but on the whole I do not find myself able to agree with the learned county court judge. It is agreed on both sides, I think, that in order to make this section and its provisoes intelligible, either something must be left out of part of them or something must be read into another part of them. It is not a satisfactory piece of legislation from any point of view.

The question arises on s. 19 of the Agriculture Act, 1920, on a claim made by a landlord for compensation for deterioration of the holding by breaches of the terms of the agreement of tenancy under which he holds. The tenant had been the tenant of the present landlord's predecessor, and that agreement was not made with this tenant. However, the arbitrator has found as a fact that the tenant held the farm upon the terms of the agreement in writing under which the father of the tenant held it. The agreement contained (inter alia) the following terms: "The tenant shall (*a*) Pay all rates taxes and assessments personally reside in the messuage cultivate the land in a husbandlike manner

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and make good all wants of repair caused by his wilful act or neglect. (*b*) Protect all trees and not cut lop or injure the same protect and cut all growing fences in a proper and husbandlike manner and clean out all ditches and drains when necessary and keep in repair all dead fences with material to be supplied by the landlord. (*c*) In the last year of his tenancy consume as far as may be the hay straw and root crop on the premises and leave all thereof not so consumed and the whole of the manure to be purchased by the landlord. (*d*) Deliver up the premises in good condition at the expiration of the tenancy. . . . . (1.) Keep his cattle horses and sheep off the racecourse to the best of his ability." The landlord served a notice to quit upon the tenant on or about August 20, 1920, and the notice expired as to the land (other than the boozy pasture) on February 2, 1922. That is in accordance with clause 2 of the agreement of tenancy which provides : " The tenancy shall be determinable by either party giving to the other on or before any second day of February a year's notice to quit expiring as to all the said premises (except as after mentioned) on a second day of February and as to the messuage outbuildings and outlet on a first day of May and upon the giving of such notice to quit the rent for the current half year shall immediately become due," and so on. Therefore the notice expired as is found here as to the land, other than what is called the boozy pasture, on February 2, and the tenant gave up possession. The tenancy would expire as to the boozy pasture in May according to the notice given in accordance with the agreement of tenancy. The landlord gave notice of a claim and particulars of a claim to be made in respect of deterioration of the holding by, putting it shortly, breaches of the agreement of tenancy. The objection was taken that he could not claim, because he had not given notice of his intention to claim before the expiration of the tenancy. I think there is no doubt that the argument proceeded before the county court judge upon this basis, that the tenancy as to the land, other than the boozy pasture, had terminated before the notice was given, but that the notice so far as the boozy

pasture was concerned was given before the tenancy had terminated, and it was no doubt conducted on the basis that it was right to separate those two parts of the whole and to consider the tenancy as terminating in respect of the different parts upon different days. According to the decision of this Court in *Swinburne* v. *Andrews* (1), given after the proceedings before the county court judge took place, it seems that that was not a correct view, because the Court decided that in the case of a tenancy of this description the tenancy does not terminate as to any part until it terminates as to the last part. If that be correct then this notice was in time as to the whole of the holding and the question which has been argued before us does not arise, but it has been argued and I think we ought to decide it.

As I have said, it is very difficult to feel any certainty as to the true construction of a section of this kind. The section provides: [His Lordship read the first part of section and continued:] Then there follow two provisoes. The first is: "Provided that compensation shall not be payable under this section unless the landlord has, before the termination of the tenancy, given notice in writing to the tenant of his intention to claim such compensation." So far there is not much difficulty, because unless the landlord has given the notice he cannot get compensation under this section, but the difficulty arises on the next proviso: "Provided also that nothing in this section shall prevent a landlord from claiming compensation for dilapidations or for the deterioration of the holding under the contract of tenancy." It may be a question whether the words, "under the contract of tenancy," qualify a claim for deterioration of the holding. I do not think it really matters, because the compensation which is claimed for the deterioration of the holding must I think be compensation for deterioration of the holding by reason of breaches of the contract of tenancy. The two constructions are these: first, the construction adopted by the county court judge, namely that the last proviso, although it says that nothing in the

(1) [1923] W. N. 157; since reported ante, p. 483.

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section shall prevent the landlord from claiming compensation for dilapidations or for the deterioration of the holding under the contract of tenancy, does in fact prevent him from claiming compensation for anything that is mentioned in the first part of the section, which put shortly, is for failure of the tenant to cultivate according to the rules of good husbandry; but that does not prevent him from claiming compensation in respect of anything that is not included in the words in the first part of the section. That construction to my mind is open to one or two very serious objections. The first is that by adopting that construction the common law rights or the contractual rights of the landlord existing at the passing of the Act are very gravely restricted, and I think it is generally admitted that in construing statutes they are not to be so construed as to take away from a man his legal rights unless it is perfectly clear and obvious that such is their intention. Another point is that that construction involves the reading into the last proviso of words something equivalent to this: "provided also that nothing in this section shall prevent a landlord from claiming compensation for dilapidations or for the deterioration of the holding under the contract of tenancy arising out of anything or caused by anything which is not mentioned in the first part of this section," or to write it out at greater length, "nothing shall prevent him from claiming such compensation for any cause other than the failure of the tenant to cultivate the holding of the landlord according to the rules of good husbandry or the terms of the contract of tenancy." That, it seems to me, is a great deal to read into the plain words of the proviso, because they are plain until you begin to construe them with the rest of the section.

The other construction is that what is meant is that this is a section intended to give compensation and not a restrictive section, as it was said. There is a restrictive proviso in it, but it is a section intended to give compensation and it does in fact give compensation to the landlord in respect of something which otherwise would not avail him—namely, failure of the tenant to cultivate in accordance with

the rules of good husbandry as defined in this Act where there is not an agreement or a covenant to that effect in the contract of tenancy. I quite recognize that in addition to having done that it goes on to include a number of matters which would be claims for compensation under the contract of tenancy, and there is a distinct overlapping between the grounds of claim mentioned in the first part of the section and those that are mentioned in the proviso. The first proviso then says that compensation shall not be payable under this section unless the landlord has given a certain notice, and goes on to include the second proviso. As was pointed out, this section is a sort of section which is said to be correlative to s. 16, which gives a new right of compensation to the tenant, and that section giving a right of compensation to the tenant has the same proviso, that compensation shall not be payable under this section unless the tenant has before the termination of the tenancy given notice in writing to the landlord of his intention to claim such compensation. Then comes s. 19, which gives, at any rate in one respect, an additional right of compensation to the landlord and which certainly starts by giving him compensation by virtue of that section, but puts the same restriction upon him—namely, that if he comes under that section, he must give notice before the termination of the tenancy.

I think, putting the matter broadly, that the intention of s. 19, taken as a whole, was this: that the landlord is to have a right to compensation under this section if he gives a notice before the termination of the tenancy and not otherwise: that if he does not give that notice, he is to have no compensation under that section, but that if he has a right under contract, apart from the section, then nothing in this section is to interfere with that right. Accordingly the question asked should be answered in the opposite way to that in which the learned county court judge has answered it.

There is another part of the case which was not dealt with by him, and which on our decision will probably have to be dealt with by him; we have not any material

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upon which we can deal with it, and therefore all we can say is that the first question the learned county court judge answered—namely, whether the claim of the landlord for compensation is barred by s. 19 of the Agriculture Act, 1920, should be answered in the negative instead of, as he answered it, in the affirmative, and I think the appellant must have the costs of this appeal. The costs below cannot be dealt with until the whole arbitration is disposed of.

WARRINGTON L.J. I am of the same opinion. Sect. 19, which is the section we have to interpret, is certainly, to say the least of it, exceedingly difficult of interpretation and it is almost, if not quite, impossible to arrive at a sensible meaning of the section without either on one construction omitting certain provisions, or on the other construction inserting words which are not in the section. Sect. 19 is one of two sections which are somewhat in pari materia, the other being s. 16. Sect. 16, stating it quite shortly, gives to the tenant who proves that the value of his holding has been increased by a certain means the right to claim compensation in respect of that increase, provided that he gives notice of his intention to claim that compensation before the termination of his tenancy. Sect. 19, the section we have to construe, gives to the landlord who proves that the value of the holding has been deteriorated during the tenancy by means therein expressed, the right to claim compensation with a like provision that, if he intends to make that claim, it shall be made before the termination of the tenancy. In s. 19, the one which gives compensation to the landlord for deterioration, it is further provided that nothing in the section shall prevent a landlord from claiming compensation for dilapidations, or for the deterioration of the holding under the contract of tenancy. That proviso obviously in its terms is intended to preserve some right of the landlord which but for it it might be possible to say had been destroyed by the previous part of the section.

I now turn to the words of the section itself, leaving out immaterial words. The section provides: [His Lordship

read s. 19 and its provisoes and continued :] It seems to me that the section obviously is intended to give to the landlord a particular claim to compensation for the deterioration of the value of the holding by the failure of the tenant to cultivate, just as the previous section was intended to give to the tenant the right to claim compensation for increase in the value of the holding by the adoption of some special system or standard of cultivation, and that all such compensation given by the section, or a claim made under the section, should not be made unless a notice of intention to make it had been given as provided in the first of the two provisoes. Then it seems to have occurred to the draughtsman, or probably to somebody who proposed an amendment to the section after the original draft of the Bill had been prepared, that if it was left where it was it might be contended that the compensation for the matters there referred to could only be claimed under the section, and that there might be a right to such compensation quite independently of the section itself, and accordingly the second of the two provisoes was inserted.

Now it seems to me that it is more reasonable to treat this proviso as one protecting the existing rights and preventing the operation of the section from being held to destroy those rights than it is to read it in the way the tenant would have us read it—namely, as destroying the rights of the landlord so far as regards deterioration by the failure of the tenant to cultivate. It is certainly true, one cannot shut one's eyes to this, that if the section is so construed, the words in the operative part of the section " the terms of the contract of tenancy " become substantially otiose. Although they become altogether otiose, I think it is more reasonable to include those words than it is to do, as Mr. Greaves-Lord invited us to do, to insert in the second of the two provisoes words which would qualify the words " nothing in this section," and so forth. He would have us read that proviso as if the right to claim compensation, which is there protected, were exclusive of such compensation as is given by the words of the operative part of the section. I think on the whole that it is better to read the second proviso quite

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differently—namely, that nothing in this section shall debar the landlord from claiming the compensation which is there expressed. I think that the learned county court judge's decision was wrong and ought to be reversed.

SCRUTTON L.J. The question the case asks is whether the claim of the landlord for compensation under the facts stated is barred by s. 19 of the Agriculture Act, 1920. The county court judge has held that it is, because the landlord only gave notice of his claim on March 28, and the tenancy of the land in respect of which he was claiming had expired on February 2, so that he did not, in the language of s. 19, give notice in writing to the tenant of his intention to claim such compensation before the termination of the tenancy. It appears on the facts stated that there was another answer to this question, because it appears from the case that the tenancy is one of a very common class of agricultural tenancies where part of the holding determines at one date and the tenancy of the other part for agricultural reasons at a later date. The notice of intention to claim was given after the first date and before the second date. Since the county court judge gave his decision it has been decided by the Court of Appeal in *Swinburne* v. *Andrews* (1) that in that case, for the purposes of the Agricultural Holding Acts, the tenancy of the land expires at the date at which the tenancy of the last portion of the land expires. If that is the correct view of the facts stated in the case then of course the notice was given before the expiration of the tenancy, and the answer of the county court judge was wrong although not for the reason argued before him.

But the point argued before the county court judge has been argued before us, and although the dates in *Swinburne* v. *Andrews* (1) are enough to dispose of this case, I think the Court should, as it has done, attempt to deal with the general question which was argued before the county court judge. It is unfortunately a difficult one, and whichever view one takes of the meaning of s. 19 one has to do violence to one

(1) [1923] W. N. 157; since reported ante, p. 483.

part of it; one either has to say that parts of the first clause of the section are otiose and unnecessary and to have no effect given to them, or one has to add a number of words to the proviso which are not in it. Sect. 18 provides: [His Lordship read sub-s. 2 of that section and continued:] Before the passing of s. 19 if the tenant broke his contract of tenancy the landlord would have had a claim against him for breach of contract. When s. 19 provides that when the landlord proves that the value of the holding has been deteriorated during the tenancy by the failure of the tenant to cultivate the holding according to the rules of good husbandry, or cultivate according to the terms of the contract of tenancy, then we are dealing with two cases, in one of which the landlord had not at that time a right to damages for failure to cultivate according to the rules of good husbandry, because that phrase as defined by statute went further than the common law obligation in every contract of tenancy, but so far as it relates to the failure to cultivate according to the terms of the contract the landlord had at that time that right under the section giving it to him. It might be construed, and indeed Mr. Greaves-Lord said it should be construed, not as a section conferring a right, but as a section taking away a right, saying, that whereas you have this right at present, you shall lose it unless you give notice before the termination of the contract of tenancy. Then there comes the proviso at the end, "Nothing in this section shall prevent a landlord from claiming compensation for the deterioration of the holding under the contract of tenancy," which must mean deterioration of the holding by breach of the contract of tenancy. Now what are you to do? The first part of the section contradicts the second part of the section, and the second part of the section contradicts the first part of the section. Are you to treat the words in the first part of the section as otiose, because the landlord already had such a right, or are you to read some words into the proviso which will limit the general words used to matters which are not dealt with in the first part of the section, and therefore make it an unnecessary proviso as it was not wanted, because the

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first part of the section did not apply to the matters which the proviso mentions, and make it one put in for greater caution? I think it is a very difficult question, and what has determined me in deciding it is this, that I think it is a general principle of construction that you do not take away a man's right to compensation without clear words, and that if you have a doubtful case where one construction results in your taking away a man's right without clear words, and the other construction results in preserving it, you preserve the construction which covers the existing rights. I decide what otherwise would seem to me to be a very difficult question on that principle, which is I think a very useful principle for the Courts to maintain, and therefore on that ground also, I think the county court judge came to a wrong conclusion and the landlord should have been allowed to present his claim. He should also have been allowed to present his claim, because *Swinburne* v. *Andrews* (1) says the notice was delivered before the termination of the tenancy. For these reasons I agree with the judgment proposed by the other members of the Court.

Appeal allowed.

Solicitors for landlord: *Rawle, Johnstone & Co., for Lingards, Sutton, Elliott & Co., Manchester.*

Solicitors for tenant: *Lovell, Son & Pitfield, for Walker, Smith & Way, Chester.*

(1) [1923] W. N. 157; since reported ante, p. 483.

W. I. C.

[IN THE COURT OF APPEAL.]

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May 8;
July 2.

UPTON *v.* GREAT CENTRAL RAILWAY COMPANY.

Workmen's Compensation—Injury by Accident—"Arising out of" the Employment—Compensation—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A workman was employed by a railway company to execute repairs at some distance from D. station on the company's line. He lived near G., another station on the line, and was entitled to travel thence to and from D. station, and to be paid for his time up to his arrival on the return journey at G. On his way home on a wet and windy day he was hurrying across the platform at D. station to enter a train going to G. when he slipped and fell, sustaining an injury from the effects of which he died. On a claim by his widow for compensation under the Workmen's Compensation Act, 1906, the county court judge found that the platform was not slippery, and there being no special risk of location, and no causal relation between the accident and the employment, the accident did not arise "out of" the employment, and no compensation was payable:—

Held, on appeal, by Lord Sterndale and Scrutton L.J. (Warrington L.J. dissenting), that the decision of the county court judge was right.

(Per Lord Sterndale M.R.) *Thom* v. *Sinclair* [1917] A. C. 127 and *Dennis* v. *White* [1917] A. C. 479 do not afford any ground for the contention that an accident arises out of the employment in any cases except those in which it happens while the workman is doing the actual thing which he is employed to do, or in which his employment exposes him to some special risk of location or otherwise.

Hunter v. *Simner* (1921) 14 B. W. C. C. 327 explained.

(Per Warrington L.J.) The absence of evidence of a special peril upon the platform causing the fall was not sufficient to prevent the accident arising "out of" as well as "in the course of" the employment.

APPEAL from an award of the judge of the Ashton-under-Lyne County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was the widow of a foreman labourer in the employ of the respondents. On September 17, 1922, he went to work on a water main some distance from Dunford Bridge Station, and after finishing his work he arrived at that station on his way home to Guide Bridge Station, at which point his employment came to an end. It was admitted that the deceased was entitled to be paid for his time calculated up to his arrival at Guide Bridge. He waited on the platform

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at Dunford Bridge until the train came in, the day being wet and windy, when he hurried across the platform to get into it, and in doing so he slipped and fell, injuring his knee. Septicæmia supervened, and he died from the effects of the injury. There was no evidence that the platform was dangerously slippery. It was not disputed that the accident arose "in the course of," but there was a question whether it arose "out of" the employment. The county court judge found that it did not, and the applicant appealed.

Shakespeare for the appellant. The county court judge was wrong in holding that the accident did not arise "out of" the employment. Where a workman is injured or killed by accident while engaged in doing what he is employed to do the accident "arises out of" the employment, and the man or his dependants are entitled to compensation under the Act. The cause of the accident is immaterial. In *Lancashire and Yorkshire Ry. Co.* v. *Highley* (1) the House of Lords decided against the workman on the ground that he was exposing himself to an added peril and was not acting within the sphere of his employment. There is nothing of that sort here.

If the man is acting reasonably in his employment he is doing that which he is employed to do: *Thom* v. *Sinclair* (2); *Dennis* v. *White* (3); *Wardle* v. *Enthoven* (4); *Allcock* v. *Rodgers* (5); *Blake* v. *Ramsay* (6); *Wales* v. *Lampton* (7); *Wright & Greig, Ld.* v. *M'Kendry* (8); *Simpson* v. *Bolsover Colliery Co.* (9); *Hunter* v. *Simner.* (10)

In running to catch the train which was to take him to his destination where his employment would have come to an end he was doing directly what he was employed to do, and the accident therefore arose "out of the employment."

The learned county court judge has misdirected himself, and there ought to be a new trial.

(1) [1917] A. C. 352.
(2) [1917] A. C. 127.
(3) [1917] A. C. 479.
(4) (1916) 10 B. W. C. C. 79.
(5) (1917) 10 B. W. C. C. 636.
(6) (1916) 10 B. W. C. C. 500.
(7) (1917) 10 B. W. C. C. 527.
(8) (1917) 12 B. W. C. C. 410.
(9) (1920) 13 B. W. C. C. 173.
(10) 14 B. W. C. C. 327.

Barrington-Ward K.C. and *Beazley* for the respondents. If the appellant's contention is right the words "arising out of the employment" might as well have been omitted from the Act. In order for the accident to arise out of the employment there must be some special risk incident to the employment, or some special exposure to ordinary risk. Here there was neither. The man's slipping and falling had nothing to do with the work which he was employed to do. There must be something in the nature of a causal connection between the employment and the accident. Lord Haldane puts it very clearly in *Thom* v. *Sinclair* (1); see also *Dennis* v. *White* (2); *Wright & Greig, Ld.* v. *M'Kendry.* (3) Here there was no special peril attached to the location. The county court judge has found that the platform was not dangerously slippery and the man was not exposed to any special peril.

Shakespeare in reply referred to *Armstrong, Whitworth & Co.* v. *Redford.* (4)

Cur. adv. vult.

July 2. LORD STERNDALE M.R. This appeal raises an important and difficult question on the Workmen's Compensation Act depending upon the true construction of the words "arising out of the employment." There has been much controversy and there have been many decisions upon the meaning of these words, and as we are told that the claim of the applicant here is supported by a powerful union of railwaymen and the respondents are a great railway company, there is reason to anticipate that there will be a decision of the ultimate tribunal of appeal finally deciding this case and perhaps affording guidance in the decision of future cases. [The Master of the Rolls stated the facts and continued:] There is no real dispute between the parties upon the point that the accident arose in the course of the employment. The learned county court judge found that there was nothing in the nature of the platform different from any ordinary platform; there was no slipperiness from the rain or anything

(1) [1917] A. C. 127.
(2) [1917] A. C. 479.
(3) 12 B. W. C. C. 410.
(4) (1920) 13 B. W. C. C. 68.

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of that kind. The respondents' solicitor admitted that the employment of the deceased continued until he arrived back at Guide Bridge Station. As the deceased was probably in the permanent employment of the respondents, I suppose the admission means that he was on duty or employed upon this particular job from the point of view of hours or pay until he got back to Guide Bridge. The accident therefore obviously happened in the course of his employment. Did it also arise out of his employment? I think there can now be no doubt that there is a distinction between "in the course of" and "arising out of the employment"—indeed the cases on the distinction are so numerous as almost to fill volumes.

I shall adopt the same course as the learned county court judge and look at the matter first apart from authority. From this point of view I should think that this accident did not arise out of the deceased's employment. The appellant's counsel admitted that his contention went to this extent, that if the deceased had stumbled on the road while walking from the water main to Dunford Bridge Station this stumble would have been an accident arising out of his employment, and if this be correct then any accident happening to him from the time of his leaving Guide Bridge until his return to it would, as it appears to me, also arise out of his employment. This seems to me to obliterate any distinction between "in the course of" and "arising out of," and indeed this was hardly disputed except in the case of very rare instances, such as lightning, bombs, etc. I cannot myself see the principle of the exclusion of these cases; but assuming it to be right with those practically negligible exceptions, the distinction is gone. I think that is wrong, and that in order that an accident should arise out of an employment there must be some connection between the two which brings them into what was called a causal relation one to the other. There are some employments which from their nature have a tendency to bring about accidents, there are some which though not of themselves risky in fact bring the workman in contact with a risk—e.g., of slipping on ice, snow, slippery pavement or rail, a banana skin or something

of that kind, which is common to all persons who are in that place, but which would not be encountered by the workman except for his employment. There is another case in which an accident may arise out of the employment, that is, where there is no special risk attaching to the employment and no risk of the location, as it is called, which the employment sends the workman to encounter, but where the accident occurs in doing the very thing which the employment required the workman to do. In that case it seems to me that there is a causal relation between the employment and the accident. It seems to me that it is under this head, if under any, that this case must fall. The county court judge has found as a fact that there was no risk of location, for he found that the platform was not slippery (the only risk that was suggested), and there was no evidence of any special risk inherent in the employment. It was however argued that this accident arose out of the deceased's employment because it happened while he was walking or running for the train, and he was employed to walk or run. I think the answer to this contention is one of fact, and that he was not employed to do anything of this sort. He was employed to do some work at a water main, and incidentally to that work he had to walk or run to and from the work from and to a train and then travel by a train. Incidentally to that work also he had to live and breathe and could not otherwise do the work, but he was not employed to live and breathe, and in my opinion he was in the same way not employed to walk or run. I think this argument ignores the difference between "in the course of" and "arising out of." I can see no special risk of location or otherwise to which the deceased was exposed by his employment, and no causal relation existing between the employment and the accident, and apart from authority I should agree with the county court judge that the accident did not arise out of the employment.

The appellant however contends that we are bound by the authorities to hold that the accident did arise out of the employment. Her counsel admits that with one possible exception to which I shall refer later there is no case in which

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the accident has been held to arise out of the employment in the absence of some special risk of location or otherwise, but he contends that the principle of the cases applies even in the absence of such risk. We were referred necessarily to a great many cases, but I do not intend to refer to them in detail. To do so would be to enter, not indeed a trackless region, but one with so many tracks leading in different directions that it is difficult to choose that which leads to the right destination. With the exception of one case in this Court, I intend to confine my examination of the authorities to two cases, for this reason. They are decisions of the House of Lords, they were the cases upon which the greatest reliance was placed by the appellant's counsel, and they undoubtedly extended the meaning of the words "arising out of" beyond the narrower meaning attached to them by this Court. These cases are *Thom* v. *Sinclair* (1) and *Dennis* v. *White*. (2) Of course our attention has often been called to these decisions, and as so much stress was laid upon them by counsel for the appellant, I have again considered them very carefully, and have come to the conclusion that they do not afford any ground for the contention that an accident arises out of the employment in any cases except those in which it happens while the workman is doing the actual thing which he is employed to do or in which his employment exposes him to some special risk of location or otherwise. I think this is clearly shown by the following passages from the speeches of the noble and learned Lords. In *Thom* v. *Sinclair* (3) Lord Haldane says: "My Lords, there are no doubt many kinds of accident which do not in any sense arise out of the employment. There may be no reason why such accidents should happen to a man in one situation rather than to a man in another, and it may therefore be impossible to pronounce truly that they are so connected with the employment as to have arisen out of it. But where a man is ordered to work under a particular roof and that roof falls in on him, it is not clear that the accident

(1) [1917] A. C. 127. (2) [1917] A. C. 479.
(3) [1917] A. C. 127, 134.

belongs to that category. If the particular accident would not have happened to him had he not been employed to work under the particular roof, there seems to be nothing in the language of the Act which precludes an occurrence from being held within it which satisfies the test proposed by the first of the alternative constructions modified to the extent I have suggested. The falling of the particular roof could only happen in one place, and the presence there of the person injured was due to the employment. The question really turns on the character of the causation through the employment which is required by the words 'arising out of.' Now it is to be observed that it is the employment which is pointed to as to be the distinctive cause, and not any particular kind of physical occurrence. The condition is that the employment is to give rise to the circumstance of injury by accident. If, therefore, the statute when read as a whole excludes the necessity of looking for remoter causes, such as some failure in duty on the part of the employer as a condition of his liability, and treats him rather as in a position analogous to that of a mere insurer, the question becomes a simple one. Has the accident arisen because the claimant was employed in the particular spot on which the roof fell? If so, the accident has arisen out of the employment, and there is no necessity to go back in the search for causes to anything more remote than the immediate event, the mere fall of the roof, and there need be no other connection between what happened and the nature of the work in which the injured person was engaged." Lord Shaw (1) says: "There may be causes of danger arising to all employees, which causes are not confined to the individual situation, but are general and applicable to the employment as a whole. It may be that that employment is underground, with all the risks attached to underground work. It may be in the air or on the sea, with a special exposure to the dangers relative to such elements; or it may be on the surface of the earth, in surroundings which are those of peril. In all such cases it is quite possible to

(1) [1917] A. C. 142.

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figure injuries by accident in the course of and arising out of the employment, which are totally disconnected with the nature of the employment upon which the workman was generally or for the moment engaged, but which, without any doubt, sprang from the employment in the sense that it was on account of the obligations or conditions thereof, and on that account alone, that he incurred the danger. In short, my view of the statute is that the expression 'arising out of the employment' is not confined to the mere 'nature of the employment.' The expression, in my opinion, applies to the employment as such—to its nature, its conditions, its obligations, and its incidents. If by reason of any of these the workman is brought within the zone of special danger and so injured or killed, it appears to me that the broad words of the statute 'arising out of the employment' apply. If the peril which he encountered was not an added peril produced by the workman himself, as in the cases of *Plumb* (1) and *Barnes* (2) in this House, then a case for compensation under the statute appears to arise." Then in *Dennis* v. *White* (3) Lord Finlay says: "There are, of course, cases in which it is necessary to inquire whether the nature of the employment specially exposes a workman to a risk of a general nature. In the case of injury by lightning it is very material to inquire whether the work involves special exposure to the danger of being so struck, as in the case of employment upon a steeple or elevated scaffolding. In the case of injury by a bomb thrown from hostile aircraft the fact that the workman was engaged on work in a building brilliantly lighted so as to attract the notice of the enemy crews might be most material as showing that the injury by the bomb was one which arises out of the employment. In the case of sunstroke or frostbite it is material to show that the work involves special exposure to the heat or the cold. If the injury is the result of an assault it is material to show that the employment is such as to involve liability to such mishaps; as in the case of a gamekeeper or watchman:

(1) [1914] A. C. 62. (2) [1912] A. C. 44.
(3) [1917] A. C. 479, 482.

see *Mitchinson* v. *Day Brothers* (1) and *Weekes* v. *Stead & Co.* (2) Where the risk is one shared by all men, whether in or out of employment, in order to show that the accident arose out of the employment it must be established that special exposure to it is involved. But when a workman is sent into the street on his master's business, whether it be occasionally or habitually, his employment necessarily involves exposure to the risks of the streets and injury from such a cause arises out of his employment. There is nothing in the Act about any necessity for showing that the employment involves an extra or special risk, and once it is clear, as it is in the present case, that the accident was the result of a risk necessarily incidental to the performance of the servant's work, all enquiry as to the frequency or magnitude of the risk is irrelevant. It is quite immaterial whether the nature of the employment involves continuous or only occasional exposure to the dangers of the streets. The frequency of the exposure to a risk increases the chance of the occurrence of an accident, but it has no bearing on the question whether it arose out of the employment, which is settled by the fact that such exposure was one of its terms whether on many occasions or on one." Lord Parker (3) says: "Most employments have peculiar risks inherent in their nature. A person employed to break stones runs the risk of being injured by a flying splinter. A person employed to climb a ladder runs the risk of injury from a fall. In neither case would positive evidence be necessary to prove that the injury by accident arose out of the employment. That it did so arise would be a legitimate inference from the nature of the employment coupled with the occurrence of the accident causing the injury. There may, of course, be risks so general that without further evidence no such inference would arise. Everyone is liable to be struck by lightning, to be frostbitten, or to be injured by bombs dropped from hostile aircraft. In such cases it may be necessary to establish the causal relationship implied in the

(1) [1913] 1 K. B. 603. (2) (1914) 7 B. W. C. C. 398.
(3) [1917] A. C. 492.

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expression 'injury by accident arising out of the employment' by positive evidence, such, for example, as proving that the circumstances of the employment exposed the employee to a greater risk than that run by persons not so employed, or not so employed under the same conditions. But these can have, in my opinion, no application to the accident with which this appeal is concerned. The learned arbitrator gave no reason for his decision, but he appears to have been influenced by the fact that in riding a bicycle through the London traffic the boy ran no greater risk of collision than anyone else riding a bicycle through the same traffic. This, though true, is nihil ad rem. A person employed to break stones or climb a ladder runs no greater risk than any other person who breaks stones or climbs a ladder, but this is no reason for holding that when he is injured by a flying splinter or a fall, the injury by accident does not arise out of his employment. If it were, the Act would in very many cases be a dead letter. In those cases where it is necessary to consider whether a particular employment by its circumstances involves special liability to a risk which is in its nature general, the contrast is between persons engaged in the particular employment or under the particular circumstances and persons not so employed or not so employed under the same circumstances. It is not between the injured workman and others doing the same thing under the same circumstances or the same conditions. When once it is manifest that what the workman is employed to do involves a particular risk, it almost necessarily follows that all who do what the workman is employed to do run the same risk; but this cannot, in my opinion, deprive the workman of his right to compensation under the Act."

These passages seem to me to afford no support to the appellant's argument, indeed their tendency seems to me to be contrary to it and to suggest that in order to arise out of the employment, an accident must result from some special risk to which that employment exposes the workman.

It may perhaps be noticed that the question now under consideration was mentioned by Lord Skerrington in

White v. *Avery*. (1) The learned Lord says this: "If in the present case the Appellant had fallen, not in consequence of the condition of the road, but simply because he tripped himself up, it may be, though I express no opinion on the point, that the arbitrator would have been entitled (if he thought fit) to negative any special connection between the injury and the employment. But in view of the actual cause of the accident I am of opinion that he was not entitled to take this course." It is unfortunate that we have not the advantage of the learned judge's opinion on the point.

The case which seems to me to go furthest in the direction of the appellant's contention is the recent case in this Court of *Hunter* v. *Simner*. (2) This case is the one to which I referred as an exception to the general rule that the cases in favour of the workman on this point proceed on the ground of exposure to a special risk. It was argued in that case that the existence of a concrete floor was a special risk, but I do not think any of the judgments were based on that fact, certainly mine was not. The injury there happened either by an accident or a fit while the workman was turning to lift a sack, a part of the work for which he was employed, and the Court held that there was evidence that such an injury might be occasioned by an accident arising out of the employment, because it happened while the workman was doing an act which he was employed for the purpose of doing. In my opinion, whether that case was right or wrong it is no authority in favour of the appellant's contention here.

To make this case in any way analogous to that the trip or fall must have occurred while the workman was doing, or turning or moving for the purpose of doing, some part of the actual work which he was employed to do at the water main. I have already expressed my opinion that he was not employed to walk or run, and that walking or running was only incidental to that for which he was employed.

I think, therefore, there is nothing in the authorities to prevent me from acting upon my opinion that the county court judge, if he did not misdirect himself in law, could

(1) (1915) 9 B. W. C. C. 663, 668. (2) 14 B. W. C. C. 327.

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come to the conclusion at which he arrived. If the appellant's contention is right he did misdirect himself, but in my opinion the contention is not right, and the appeal must be dismissed with costs.

WARRINGTON L.J. This is an appeal by a dependant of a workman who died as the result of an injury by accident. It was admitted in the Court below and before us that the accident arose in the course of the man's employment. The learned county court judge however held that in law, on the facts as found by him, it did not arise out of the employment. The question before us is whether he was right in so holding.

The man was a foreman labourer in the employ of the Great Central Railway Company, the respondents. He lived near Guide Bridge Station, and on the day of the accident was employed to do certain work near Dunford Bridge Station. It was part of the terms of his employment that he should be conveyed from Guide Bridge to Dunford Bridge and back in trains of the respondents'. The remaining facts are found by the learned judge as follows: "After finishing his work, he arrived at Dunford Bridge on his way to Guide Bridge. He waited on the platform with other workmen for the train. It was a wet windy morning. The train came in. He went hurriedly across the platform to get into the carriage, he slipped, fell, injured his knee, and, blood poisoning subsequently supervening, he died. His death was the result of the fall." He says further: "The suggestion that the platform was slippery was not borne out by the evidence and I do not find that there was anything corresponding to a zone of special danger." He states his conclusions as follows: "If I were satisfied that the fall or the injury was due to any peril upon the platform, I should find that this accident arose out of the employment. But to me the fall is unexplained, in the sense that I cannot say what caused it. It was certainly not inconsistent with the absence of any peril upon the platform."

The real question is whether the learned judge was right

in holding that the absence of evidence of a special peril upon the platform causing the fall was sufficient to prevent him from holding that the accident arose out of as well as in the course of the man's employment.

In crossing the platform he was doing a thing which he was employed to do and in doing it he met with the accident in question. The question in the present case is not complicated by any suggestion of the existence of a physical condition of the workman, causing the fall, as was the case, for instance, in *Wright & Greig, Ld.* v. *M'Kendry*. (1) In the absence of authority I should, on the facts as found, have myself come to the conclusion that the man's fall was caused by the particular act of his employment in which he was engaged, and that it was unnecessary for the applicant to prove any definite or special peril to which the doing of that act exposed him. The accident was a fall upon the station platform when the man was hurrying to the train. May not such a fall, not otherwise explained, be properly regarded as an incident of the place in which and the circumstances under which the man was at the moment being employed, and therefore as arising out of the employment?

Now as to the authorities. In my opinion the expressions of opinion delivered in *Dennis* v. *White* (2) by certain of the Lords who took part in the decision, support the view I have expressed. In his speech in that case, which was one of a street accident, Lord Finlay (3) says: "If a servant in the course of his master's business has to pass along the public street . . . . and he sustains an accident by reason of the risks incidental to the streets, the accident arises out of as well as in the course of his employment." Lord Loreburn in the same case said (4): "When a man runs a risk incidental to his employment and is thereby injured, then the injury arises out of his employment." I think I ought also to read a passage from the speech of Lord Parker in the same case (5): "Most employments have peculiar risks inherent

(1) 12 B. W. C. C. 410.
(2) [1917] A. C. 479.
(3) [1917] A. C. 482.
(4) Ibid. 489.
(5) Ibid. 492.

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in their nature. A person employed to break stones runs the risk of being injured by a flying splinter. A person employed to climb a ladder runs the risk of injury from a fall. In neither case would positive evidence be necessary to prove that the injury by accident arose out of the employment. That it did so arise would be a legitimate inference from the nature of the employment coupled with the occurrence of the accident causing the injury. There may, of course, be risks so general that without further evidence, no such inference would arise. Everyone is liable to be struck by lightning, to be frost-bitten, or to be injured by bombs dropped from hostile aircraft. In such cases it may be necessary to establish the causal relationship implied in the expression 'injury by accident arising out of the employment' by positive evidence, such, for example, as proving that the circumstances of the employment exposed the employee to a greater risk than that run by persons not so employed, or not so employed under the same conditions." Again, in the judgment of Lord Salvesen, in *Wright & Greig, Ld.* v. *M'Kendry* (1), there occurs the following passage: "A workman has occasion to move about his employers' premises, and if in doing so he accidentally falls and meets with an injury, there is I think a clear case for compensation under the Act. I should be of the same opinion although he had fallen on a perfectly level floor through tripping over his own foot. Such an accident no doubt seldom leads to serious injury. None the less, when it does occur, it gives a claim for compensation under the Act if it occurred while the man was moving about his employers' premises in the course of performing his duty, and is therefore a risk incident to his employment." This expression of opinion is all the more valuable that in the particular case the learned judge, differing from his brethren, held that the accident there in question did not arise out of the employment.

The same view is, I think, expressed by Lord Sterndale in *Hunter* v. *Simner*. (2) He says this: "I think that the facts do afford evidence that the accident arose out of the

(1) (1918) 12 B. W. C. C. 410, 425. (2) 14 B. W. C. C. 327, 330.

workman's employment. They seem to me to afford evidence that the deceased man fell while turning to do something required of him in his employment, namely, to pick up a sack. This I think, is enough. If a workman falls while doing something required for his work, I think that fall, prima facie, is an accident arising out of his employment." In the present case the workman fell while doing something required for his work, that is to say, while crossing the platform in order to get to the train which would take him home to Guide Bridge. In the same case Atkin L.J. (1) says this : " In any case there was no evidence which made such a cause as probable as that the deceased had slipped and fell while in the course of his ordinary duties. If he was injured by such a fall on his employers' premises, where his duties required him to be, it appears to me that he was injured by an accident arising out of his employment. The necessity for a direct causal relation between the employment and the injury has been expressly negatived in the decisions of the House of Lords: *Thom* v. *Sinclair* (2); *Dennis* v. *White* (3); and *Arkell* v. *Gudgeon.* (4) " I think on these authorities I am justified in holding that the man's fall when crossing the platform on his employers' business may properly be treated as incidental to his employment and therefore arising out of it.

It is true that in most, if not all, the cases of a similar nature to which we have been referred, it was possible to find a specific cause for the fall—a loose piece of wood in the yard a workman has to cross and on which he slips, patches of ice on a roadway a man has to traverse, a slippery rail which crosses his path and on which he steps, a snowy railway platform which a hotel porter has to cross, and so forth. But the fact that in those cases a specific peril was discovered does not in my opinion exclude a case in which the fall is incidental to the employment, though no specific cause can be assigned. Indeed, in one case, at all events, *Armstrong, Whitworth & Co.* v. *Redford* (5), there appears to have been

(1) 14 B. W. C. C. 332.
(2) [1917] A. C. 127.
(3) [1917] A. C. 479.
(4) (1917) 10 B. W. C. C. 660.
(5) 13 B. W. C. C. 68.

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no specific peril other than that arising from the hurried descent of a staircase.

On the whole, I think that the decision of the learned judge was wrong, and that the case ought to be remitted to him to assess the compensation.

SCRUTTON L.J. This appeal raises the question of the meaning in the Workmen's Compensation Act of the words "accident arising out of and in the course of his employment," especially of the words "out of," each letter of which may be said figuratively to have cost a king's ransom.

There is no doubt that the words "out of and in the course of his employment" cannot be translated into "whilst employed." Some causal relation between the accident and the employment must be proved. There is also no doubt that the decisions of the House of Lords in *Thom* v. *Sinclair* (1) and *Dennis* v. *White* (2) have reversed the narrower interpretation which previous decisions of the Court of Appeal such as *Sheldon* v. *Needham* (3) had placed on the words. Where a boy was employed to bicycle in the streets, the risks of street bicycling were held to arise out of his employment; and where a charwoman sent on a street message slipped on a piece of banana skin, the House of Lords thought the accident arose out of her employment, though the Court of Appeal in each case had taken the other view. It is certain now that where the employment takes one into a place of danger, accident from that danger arises out of the employment. People employed walking, who slip on snow: *Shaw* (*Glasgow*), *Ld.* v. *Macfarlane* (4); *Blake* v. *Ramsay* (5); or on ice: *White* v. *Avery* (6); or on a greasy spot on the pavement: *Arkell* v. *Gudgeon* (7); or on a rail: *Marsh* v. *Pope & Pearson* (8), suffer an accident arising out of their employment, though the accident might happen to any one who unemployed came

(1) [1917] A. C. 127.
(2) [1917] A. C. 479.
(3) (1914) 7 B. W. C. C. 471.
(4) (1914) 8 B. W. C. C. 382.
(5) 10 B. W. C. C. 500.
(6) 9 B. W. C. C. 663.
(7) 10 B. W. C. C. 660.
(8) (1917) 10 B. W. C. C. 566.

into that place. It is otherwise where the danger, though it happens in that place, to a person employed in that place, might happen equally well anywhere, as in the case of lightning: *Kelly* v. *Kerry County Council* (1); frostbite: *Warner* v. *Couchman* (2); explosion of bombs in an air raid: *Allcock* v. *Rogers*. (3) Though the actual damage happens in a place where the workman is employed, the actual place does not add to the danger, which might happen anywhere. It is otherwise if the place does increase the danger; then the workman recovers.

If in the case before us any special danger in the platform had been shown, the injury would clearly have arisen out of the employment. But the judge finds no danger in the platform, and does not know why the man slipped. The appellant's counsel argues that the man was employed to walk; that it is a risk of walking to slip or stumble, and therefore the accident arose out of the employment. I suppose he would also say that the man is employed to keep himself alive by breathing; that it is a risk of breathing that you may choke yourself by swallowing saliva, or nuts, or sweets, and that if the man choked himself, without its being known exactly how or why he did it, the accident arose out of his employment.

The exact point seems to be discussed by Lord Skerrington in *White* v. *Avery* (4), where he considers the case of a man tripping himself up and stumbling, without anything special in the condition of the road, and reserves his opinion. In my view, the very instructive judgment of Lord Parker in *Dennis* v. *White* (5) is of great assistance. Stumbling would be a risk so general that it would be necessary to prove a causal connection between the employment and stumbling, as by proving that the employment exposed the workman to a special risk of stumbling, greater than that of an unemployed person under the same conditions. I have felt the great difficulty of laying down any clear rule on the subject. I

(1) (1908) 1 B. W. C. C. 194.
(2) (1911) 5 B. W. C. C. 177.
(3) (1918) 11 B. W. C. C. 149.
(4) 9 B. W. C. C. 663, 668.
(5) [1917] A. C. 479, 491.

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am not satisfied that the county court judge was wrong on any matter of law. I am inclined to think he was right; there is no appeal from him on fact, and I should therefore dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Pattinson & Brewer; Thos. Chew.*

G. A. S.

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29 Car. 2, c. 3 (Statute of Frauds), s. 4: SCOTT *v.* PATTISON - **Div. Ct. 723**

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9 Edw. 7, c. 44 (Housing, Town Planning, etc.), s. 15: RYALL *v.* HART **Div. Ct. 464**

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10 & 11 Geo. 5, c. 58 (Shops (Early Closing)), Sch., Pt. I., Art. 1: LONDON COUNTY COUNCIL *v.* GAINSBOROUGH **Div. Ct. 301**

10 & 11 Geo. 5, c. 76 (Agriculture), s. 10, sub-s. 7 (*b*): SWINBURNE *v.* ANDREWS - - - **C. A. 483**

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